

United States
Circuit Court of Appeals
For the Ninth Circuit. 8

CONTINENTAL NATIONAL BANK, a Corpora-
tion,

Plaintiff in Error,

vs.

MARY NEVILLE,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court, for the Southern District of Cal-
ifornia, Southern Division.

FILED

AUG 14 1922

F. D. MONCKTON,
CLERK.

No.

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Circuit Court of Appeals
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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Amended Answer	12
Amended Complaint	6
Bill of Exceptions:	
Assignment of Errors.....	86
Assignment of Errors.....	95
Bond on Appeal.....	104
Exhibits:	
Defendant's:	
Exhibit B	60
Plaintiff's:	
Exhibit No. 5 (Checks).....	32
Exhibit No. 7 (Bank Book).....	45
Exhibit No. 9b (Card).....	28
Exhibit No. 10 (Check).....	26
Exhibit No. 11 (Check).....	30
Exhibit No. 12 (Deposit Slips).....	49, 58
Instructions	74
Order Allowing Writ of Error.....	102
Petition for Writ of Error.....	100
Praeipce	107
Supplemental Praeipce	109
Testimony on Behalf of Defendant:	
Nichols, Frank H.....	63
Cross-Examination	61
Redirect Examination	72
Wolfe, Maurice J.....	54

	PAGE
Testimony on Behalf of Plaintiff:	
Neville, Kate	53
Neville, Mary	24
Cross-Examination	46
Redirect Examination	49
Citation	2
Judgment	21
Names and Addresses of Attorneys.....	1
Verdict	20
Writ of Error.....	4

Names and Addresses of Attorneys:

For Plaintiff in Error:

HAAS & DUNNIGAN, Esqs., Citizens National
Bank Building, Fifth and Spring Sts., Los
Angeles, Calif.

For Defendant in Error:

GEO. B. ROSS, Esq., and
NEWBY & PALMER, Esqs., Washington Build-
ing, Third and Spring Sts., Los Angeles, Cali-
fornia.

IN THE DISTRICT COURT OF THE UNITED
STATES, FOR THE SOUTHERN DISTRICT
OF CALIFORNIA, SOUTHERN
DIVISION.

MARY NEVILLE,	)	No. 896 Civil.
)	
Plaintiff.)	
	)	CITATION ON
vs.	)	WRIT OF
	)	ERROR.
CONTINENTAL NATIONAL)	
BANK, a corporation, and FRED)	
BIRDSALL,)	
)	
Defendants.)	

United States of America, - SS

To Mary Neville, plaintiff above named, and defend-
ant in error, GREETING:

You are hereby cited and admonished to appear before the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to writ of error duly issued and now on file in the clerk's office of the United States District Court for the Southern Division of the Southern District of California, wherein Continental National Bank of Los Angeles is plaintiff in error, and you are defendant in error, to show cause if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Oscar A. Trippet, United States District Judge for the Southern District of California, this 10th day of July, 1922.

Trippet

United States District Judge.

Received a copy of the above citation on writ of error this 11th day of July, 1922.

George B Ross and
Newby & Palmer

Attorneys for Plaintiff.

[Endorsed]: Original No. 896 Civil IN THE DISTRICT COURT OF THE UNITED STATES, for the Southern Division of the Southern District of California. MARY NEVILLE Complainant vs. CONTINENTAL NATIONAL BANK, a corporation, et al, Defendants CITATION ON WRIT OF ERROR FILED JUL 11 1922 CHAS. N. WILLIAMS, Clerk by R S Zimmerman Deputy Clerk HAAS & DUNNIGAN Suite 302 B. F. Coulter Building 213 S. Broadway Los Angeles, Cal. Solicitors for deft.

WRIT OF ERROR
UNITED STATES OF AMERICA - SS

The President of the United States of America, To
the Honorable, the Judges of the District Court
of the United States for the Southern District of
California, Southern Division, GREETING:

Because in the record and proceedings, as also in the
rendition of a judgment and plea which is in said Dis-
trict Court, before you, or some of you, between the
Continental National Bank of Los Angeles, defendant
and plaintiff in error, and Mary Neville, as plaintiff
and defendant in error, said cause being numbered
896 Civil of the files of your court, a manifest error
hath happened, to the great damage of said Conti-
nental National Bank, plaintiff in error, as by its
complaint appears:

We, being willing that error, if any hath been, should
be duly corrected, and full and speedy justice done to
the parties aforesaid in this behalf, do commend you
that if judgment be therein given, that then, under
your seal, distinctly and openly, you send the record
and proceedings aforesaid, with all things concerning
the same, to the United States Circuit Court of Ap-
peals, for the Ninth Circuit, together with this writ,
so that you have the same at the City of San Fran-
cisco, in the State of California, within thirty days
from the date hereof, in the said Circuit Court of
Appeals, to be then and there held, that, the record
and proceedings aforesaid being inspected, the said Cir-

cuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS, the Honorable William H. Taft, Chief Justice of the United States, the 7th day of July, in the year of our Lord one thousand nine hundred and twenty-two.

CHAS. N. WILLIAMS,

Clerk of the United States District Court in and for the Southern District of California, Southern Division,

(seal)

By R S Zimmerman

Deputy Clerk.

Allowed by

Trippet

District Judge.

[Endorsed]: ORIGINAL No. 896 Civil IN THE DISTRICT COURT OF THE UNITED STATES, for the Southern Division of the Southern District of California. MARY NEVILLE Complainant vs. CONTINENTAL NATIONAL BANK a corporation et al, Defendants WRIT OF ERROR FILED JUL 7 1922 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk HAAS & DUNNIGAN Suite 302 B. F. Coulter Building 213 S Broadway Los Angeles, Cal. Solicitors for deft.

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT
OF CALIFORNIA SOUTHERN
DIVISION

MARY NEVILLE)	
)	
Plaintiff	)	AMENDED
vs.	)	COMPLAINT
	)	FOR MONEY
CONTINENTAL NATIONAL	)	DEMAND
BANK and ALFRED W. BIRD-	)	\$5,000.00
SALL)	
)	
Defendants)	

Comes now Mary Neville, and the court having entered an order substituting her, the said Mary Neville, as the plaintiff herein, and with leave of court first had and obtained, files her amended complaint, and avers:

I.

That the plaintiff is now and for many years last past has been a resident and citizen of the state of Texas.

II.

That the defendant, Continental National Bank, is a banking corporation duly organized and existing under and by virtue of the national banking laws of the United States, with its principal place of business at Los Angeles, state of California.

III.

That said defendants, Continental National Bank, and Alfred W. Birdsall, are residents of the said city of Los Angeles, and citizens of the state of California.

IV.

That said defendants are indebted to plaintiff in the sum of Four Thousand Four Hundred (\$4,400.00) Dollars, with interest thereon, for moneys had and received by them to the use of said plaintiff, Mary Neville.

V.

That plaintiff duly demanded of defendants the payment of said money on the 2d day of December, 1920, and defendants have failed and refused to pay the same or any portion thereof, except nine and eighty-five hundredths (\$9.85) Dollars.

VI.

That said sum of Four Thousand Four Hundred (\$4,400.00) Dollars, together with interest thereon from the 2d day of December, 1920, is now due from defendants to plaintiff and is wholly unpaid.

SECOND COUNT

And for a further and second cause of action plaintiff reavers paragraphs I, II and III of the first count hereof, and hereby refers to said paragraphs and makes them a part hereof.

IV.

That said defendant, Continental National Bank, is and has been for some years last past conducting a banking business in said city of Los Angeles.

V.

That the said plaintiff, Mary Neville, at the instance and solicitation of the defendant Birdsall, opened a

bank account with said bank on the 21st day of September, 1920, under the name of Mary Neville Bird-sall, and at various times deposited and caused to be deposited in her said account a total sum of Four Thousand Four Hundred (\$4,400.00) Dollars.

VI.

That the defendants withdrew from said account so deposited by said plaintiff, without the knowledge or consent of said plaintiff, and without her authority, all of said sum so deposited, except the sums of \$113.60 drawn therefrom by said plaintiff, and of \$9.85 now claimed to be held by said bank as a balance in said account.

VII.

That plaintiff has demanded and caused to be demanded of defendants the payment of the amount due to said plaintiff on said deposit account, by a check duly drawn on said account, and has been advised by said defendants that there is but \$9.85 remaining in said account, and the defendants have refused to pay the plaintiff any other or further sum than said balance of \$9.85.

VIII.

That there is now due and wholly unpaid from defendants to plaintiff the sum of Four Thousand Four Hundred (\$4,400.00) Dollars, with interest thereon from the date of said demand.

THIRD COUNT

And for a further and third cause of action plaintiff reavers paragraphs I, II, III, IV and V of the

second count of this complaint, and hereby refers to said paragraphs and makes them a part hereof.

VI.

Plaintiff avers that at all of the times of the said deposit and withdrawal of said funds the said plaintiff was a minor of the age of seventeen years, and the defendant Birdsall was a man of about fifty years of age. That said Birdsall, shortly prior to the time of the opening of said account, entered into a pretended marriage with this plaintiff for the purpose of procuring the money and property which constituted said plaintiff's estate, when in truth and in fact the said Birdsall then and there had a former wife living and from whom he had not been divorced, and which said former marriage was then and there in full force and effect, as the said Birdsall then and there well knew. That said Birdsall was an intimate friend and associate of various officers of the defendant bank; and the said Birdsall caused the employees and officers of said bank to enter upon their books containing said account of Mary Neville Birdsall the name of Fred Birdsall, so as to make it appear that said account of Mary Neville Birdsall was the joint account of said Mary Neville and the said defendant Birdsall; that said defendant Birdsall caused said employees and officers of said bank to so alter and change said books and account so that he, the said Birdsall, could withdraw said plaintiff's money from said bank and convert it to his own use. That the employees and officers of said

bank so carelessly and negligently conducted the business of said bank that they did, at the request of the said Birdsall alone so alter and change their said books and the account of said plaintiff by adding the name of Fred Birdsall thereto, without the knowledge or consent of said plaintiff and without any authority whatever so to do; and they carelessly and negligently paid out the funds and estate of the said plaintiff, Mary Neville, without the knowledge or consent or authority of said Mary Neville, upon checks signed by the defendant Birdsall only, and drawn against said account of Mary Neville Birdsall, without the knowledge or consent of the said plaintiff, Mary Neville. That said plaintiff attained the age of eighteen years on October 30, 1920.

VII.

That plaintiff has demanded the payment of the moneys so deposited in the said account of Mary Neville Birdsall from said defendants, and said defendants have wholly failed and refused to repay said sum or any part thereof, except the sum of \$9.85, which said bank claims to be the entire balance due on said account.

WHEREFORE plaintiff prays judgment against defendants for the sum of Five Thousand Dollars, and for all relief proper in the premises.

George B. Ross and

Newby & Palmer,

Attorneys for Plaintiff

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

MARY NEVILLE, being first duly sworn, deposes and says: That she is the plaintiff in the above entitled action; that she has read said amended complaint and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters therein stated upon information and belief, and that as to such matters she believes it to be true.

Mary Neville

Subscribed and sworn to before me
this 28th day of January, 1921.

Jessie McDill

Notary Public in and for the County
of Los Angeles, State of California
(Seal)

[Endorsed]: No. 896 Civil IN THE DISTRICT COURT OF THE UNITED STATES In and for the Southern District of California SOUTHERN DIVISION MARY NEVILLE Complainant vs. CONTINENTAL NATIONAL BANK et al Defendants AMENDED COMPLAINT FOR DAMAGES Received copy of the within Amended Complaint this 31 day of Jany 1921 Haas & Dunnigan Attorney for Deft Bank FILED Jan 31 1921 Chas. N. Williams, Clerk Fred E Subith Deputy NEW ADDRESS 1108 WASHINGTON BLDG. Los Angeles, Cal. Newby & Palmer Attorneys for plaintiff

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT
OF CALIFORNIA SOUTHERN
DIVISION.

MARY NEVILLE,	) NO. 896 Civil.
)
Plaintiff)
	) AMENDED
vs.	) ANSWER OF
	) DEFENDANT,
CONTINENTAL NATIONAL	) CONTINENTAL
BANK and ALFRED W. BIRD-	) NATIONAL
SALL,	) BANK.
)
Defendants.)

Comes now the defendant, Continental National Bank, and for amended answer to plaintiff's complaint on file herein, for amended answer to the first count of said complaint, avers and denies as follows, towit:

I.

This defendant avers that it has not sufficient information or belief to enable it to answer the allegations of paragraph I of said first count of said complaint, and by reason of such lack of information or belief, it denies that plaintiff is a resident of the State of Texas, and upon information and belief avers that plaintiff is, and during all the times referred to in plaintiff's complaint herein, was resident of the State of California.

II.

This defendant, for answer to paragraph IV of said complaint, denies that it is indebted to the plaintiff

in the sum of Four Thousand Four Hundred (\$4,400.00) Dollars, or any other sum, either with or without interest, except the sum of Nine and 85/100 (\$9.85) Dollars, which said sum of Nine and 85/100 (\$9.85) Dollars is now on deposit to the credit of the plaintiff or the defendant Alfred W. Birdsall, in the hands of this defendant as a banking corporation.

III.

This defendant, for answer to paragraph VI of said count of said complaint, denies that the sum of Four Thousand Four Hundred (\$4,400.00) Dollars, either with or without interest, either from the 2nd day of December, 1920, or any other date, is due from this defendant to the plaintiff.

This defendant, further answering said complaint, and for answer to the second count of said complaint, hereby re-iterates and repeats its answer to paragraphs I, II and III of said first count of said complaint to the same extent as if the said answers to said paragraphs were here repeated and re-iterated in *hic verba*.

IV.

This defendant, for answer to paragraph V of said second count of said complaint, denies that the said Mary Neville, either at the instance of the defendant Birdsall or otherwise, or at all, opened any bank account with this defendant in her own name; alleges that the bank account therein referred to was opened by the said defendant Alfred W. Birdsall in the name of himself and or the plaintiff Mary Neville Birdsall,

his wife; this defendant denies that any money was deposited in said account by the said plaintiff; alleges that all moneys deposited in said account were deposited by the defendant Alfred W. Birdsall, and this defendant alleges that it is informed and believes, and upon such information and belief alleges the fact to be, that all of the sums so deposited in said account, were the moneys and property of the said defendant Alfred W. Birdsall, and not any of said moneys were the property of the said plaintiff.

V.

This defendant, further answering said second count of said complaint, for answer to paragraph VI of said second count, denies that it withdrew or removed from the account last hereinbefore referred to, either with or without the knowledge of the said plaintiff, or with or without her authority, any of the moneys deposited to said account, or in any account, except that it paid out of said account, upon the checks of the plaintiff and the said Alfred W. Birdsall, all of the moneys so deposited therein, except the sum of \$9.85, which still remains in said account.

VI.

For answer to paragraph VIII of said second count of said complaint, denies that there is now due or unpaid to the plaintiff by this defendant, the sum of \$4,400.00, or any other sum except the balance yet remaining in said account, towit the sum of \$9.85.

This defendant, further answering said complaint, for answer to the third count thereof, re-iterates and

repeats its answer to paragraphs I, II, III, IV and V of the second count of said complaint, to the same force and effect as though said answer to said paragraphs of the second count of said complaint were here repeated and re-iterated in *hic verba*.

VI.

This defendant, for answer to paragraph VI of the third count of said complaint, avers it has not sufficient information or belief to enable it to answer the allegations of said paragraph VI hereinafter referred to, and by reason of such lack of information and belief, it denies that at any of the times of the deposits or withdrawals referred to in said third count of said complaint, that the plaintiff was a minor under the age of seventeen (17) years, or that the defendant Birdsall was a man of the age of fifty (50) years or thereabouts, or that the marriage entered into between the plaintiff and the said defendant Birdsall was pretentious or a pretended marriage, or for the purpose of procuring money or property which constituted plaintiff's estate, or any other money or property, or that the said Birdsall had a former wife living at the time of said marriage between said plaintiff and the defendant Birdsall, or that a divorce between said Birdsall and a former wife had not been granted, or that any former marriage between the said Birdsall and any other woman was then in force and effect, or that such or any facts were known to said defendant Birdsall, or that the said defendant Birdsall was an intimate friend or associate of the officers of the

defendant bank or that the said defendant Birdsall caused any of the employees or officers of the defendant bank to enter upon the books containing any account with the plaintiff, the name of the defendant Birdsall, other than as hereinafter directly alleged.

VII.

This defendant, further answering said paragraph VI of said third count of said complaint, denies that the name of the defendant Birdsall was added to any account of the plaintiff with it as a bank, or on its books; denies that this defendant ever had any account with the said plaintiff other than a joint account between the plaintiff and the said defendant Birdsall; that said account was opened by the defendant Birdsall with his own money as such joint account, and was never thereafter altered or changed in any manner whatsoever; deny that the said defendant Birdsall caused the employees or officers of this defendant to alter or change its books, or that its books were either altered or changed in any respect whatsoever as alleged in said paragraph or otherwise. Deny that any of the employees or any of the officers of this defendant either carelessly or negligently conducted the business of this bank, either at the request of the defendant Birdsall or otherwise, or at all, so as to in any manner alter the books of this defendant, or alter or change the records or accounts of this defendant with the plaintiff by adding the name of the defendant Birdsall therein, or in any other respect whatsoever, either with or without the knowledge or consent

of the plaintiff, or with or without the authority of the plaintiff; deny that they either carelessly or negligently paid out any of the funds or estate of the plaintiff, without her knowledge or consent, and deny that the plaintiff attained the age of majority at any time subsequent to the opening of said account.

VIII.

This defendant, as a further and separate defense to said complaint avers that at all times mentioned in said complaint, and in this answer, that the plaintiff held herself out to be and represented to the world, that she was the true and lawfully wedded wife of the defendant, Alfred W. Birdsall; that she resided within the State of California, and lived and co-habited with the said defendant Birdsall as his true and lawful wife, and that this defendant had not, at any of said times, any knowledge to the contrary, and that the said plaintiff by so holding out and representing herself as aforesaid to the world at large and to this defendant, has and is estopped from asserting or claiming that she was not married to defendant Birdsall, or that she was not of full majority and capable to transact and carry on business.

IX.

This defendant is informed and believes, and therefore alleges, that at all of said times above set forth, the plaintiff well knew the true facts with respect to her age, and with respect to her marriage to the said Birdsall, and her marital condition, and with respect to her residence and to her being a resident of

the State of California, and that during all of said time said plaintiff represented herself to be of the age of eighteen (18) years, and over, and that she was fully cognizant of all of the facts, and the actual fact with respect to her age, and that this defendant had no information to the contrary.

WHEREFORE, this defendant prays that plaintiff take nothing by this action, and that it have its costs in and about this action expended, and such other relief as to the Court may seem proper in the premises.

HAAS AND DUNNIGAN,

Attorneys for Defendant,

Continental National Bank.

STATE OF CALIFORNIA, ()
) SS.
COUNTY OF LOS ANGELES.(

W. D. HOWARD, being duly sworn, deposes and says: That he is an officer, towit, the Vice-President of the defendant corporation, Continental National Bank, named in the foregoing answer, and that he verifies said answer for and on behalf of said corporation, and as such officer thereof; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to such matters and facts therein stated upon information and belief, and that as to such matters and facts, that he believes it to be true.

W D Howard

Subscribed and sworn to before me
this 14th day of March, 1921.

M J Wolfe

Notary Public in and for the County
of Los Angeles, State of California.

(Seal)

[Endorsed]: ORIGINAL No. 896 IN THE DISTRICT COURT OF THE UNITED STATES for the Southern Division of the Southern District of California. MARY NEVILLE, Complainant vs. CONTINENTAL NATIONAL BANK, et al, Defendant AMENDED ANSWER OF DEFENDANT, CONTINENTAL NATIONAL BANK. Received copy of the within amended answer this 15 day of March 1921 George B. Ross Newby & Palmer Solicitors for Complainant FILED MAR 15 1921 Chas. N. Williams, Clerk C. W. Kerr Deputy HAAS & DUNNIGAN Suite 302 B. F. Coulter Building 213 S. Broadway Los Angeles, Cal. Solicitors for deft.

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA.
SOUTHERN DIVISION.

* * * * *

Mary Neville,)	
)	
Plaintiff,)	
)	
vs.	)	No. 896 Civil.
)	
Continental National Bank, et al.,)	
)	
Defendants.)	

We, the Jury in the above-entitled action, find in favor of the Plaintiff, and against the Defendants, Continental National Bank and Fred Birdsall, in the sum of \$3386/40 and interest.

Los Angeles, California, February 8, 1922.

F. H. Vesper
Foreman

FILED FEB 8 1922

Chas. N. Williams, Clerk
Louis J Somers Deputy

UNITED STATES OF AMERICA DISTRICT
COURT OF THE UNITED STATES SOUTH-
ERN DISTRICT OF CALIFORNIA.
SOUTHERN DIVISION.

* * * * *

Kate Neville, Guardian of the)	
Person and Estate of Mary Ne-)	
ville, a minor,)	
)	
Plaintiff,)	
)	
vs.)	No. 896 Civil.
)	JUDGMENT.
Continental National Bank and)	
Alfred W. Birdsall,)	
)	
Defendants.)	

On Tuesday, the 7th day of February, 1922, being a day in the January, A. D., 1922, Term of the District Court of the United States for the Southern District of California, Southern Division, this cause came on for trial before the Court and a jury to be duly impanelled; Wm. F. Palmer, Esq., and Geo. B. Ross, Esq., appearing as counsel for the plaintiff; and R. L. Dunnigan, Esq., appearing as counsel for the defendant Continental National Bank; and counsel for the respective parties being now ready to proceed with the trial of this cause, and the Court ordered that the trial be proceeded with; thereupon a jury of twelve men was duly impanelled; and witness on behalf of respective parties having been examined and exhibits introduced by respective parties, and said cause having

been continued to the 8th day of February, 1922, and after argument by respective counsel, and the instructions of the Court, said cause having been submitted to the jury for its consideration and decision, and, on said 8th day of February, 1922, the Jury having returned the following Verdict, to-wit:

“IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION. Mary Neville Plaintiff vs. Continental National Bank, et al, Defendants. No. 896 Civil. We, the Jury in the above entitled action, find in favor of the plaintiff, and against the Defendants, Continental National Bank and Fred Birdsall, in the sum of \$3386.40 and interest. Los Angeles, California, February 8, 1922. F. H. Vesper, Foreman” and the Court ordered that Judgment be entered in favor of the Plaintiff and against the Defendants in accordance with the Verdict of the Jury, with costs taxed in favor of the Plaintiff;

NOW, THEREFORE, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that the Plaintiff, Kate Neville, Guardian of the Person and Estate of Mary Neville, a minor, do have and recover of and from the Defendants, Continental National Bank and Fred Birdsall, the sum of Three Thousand Three Hundred Eighty-six and 40/100 (3,386.40) Dollars, with interest,* and costs taxed in favor of the Plaintiff.

JUDGMENT ENTERED FEBRUARY 8, 1922.

CHAS. N. WILLIAMS, Clerk

By Louis J. Somers

Deputy Clerk.

*Amended per Minute

Order July 7 1922

[Endorsed]: No. 896 Civil. UNITED STATES DISTRICT COURT Southern District of California Southern Division. Kate Neville, Guardian of the Person and Estate of Mary Neville, a minor, Plaintiff, vs. Continental National Bank and Alfred W. Birdsall, Defendants. COPY OF JUDGMENT. Filed Feb 18 - 1922 Chas N Williams Clerk R S Zimmerman Deputy

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

Southern Division.

(Hon. Oscar A. Trippet, Judge.)

--- o ---

MARY NEVILLE,

Plaintiff,

vs

CONTINENTAL NATIONAL BANK, and FRED W. BIRD-SALL,

Defendants.

--- o ---

BE IT REMEMBERED that the above entitled action came on regularly for trial before the above

entitled court, Hon. Oscar A. Trippet, Judge Presiding, the plaintiff appeared by her attorneys Messrs Newby & Palmer, and George B. Ross, Esq., and the defendant, Continental National Bank, appearing by its attorneys, Messrs. Haas & Dunnigan, and the defendant Fred W. Birdsall not appearing either in person or by attorney:

BE IT FURTHER REMEMBERED, that thereupon a jury of 12 competent and qualified men were duly and regularly selected and empaneled to try the cause;

BE IT FURTHER REMEMBERED, that thereupon the following evidence was introduced and the following proceedings were had:

MARY NEVILLE, Plaintiff in the action, called as a witness in her own behalf, testified as follows:

My home is in Alpine, Texas. I was 20 years old on the 30th of October last.

Q Miss Neville, where did you first meet A. W. Birdsall or Fred Birdsall?

MR. DUNNIGAN: That is objected to as incompetent, irrelevant and immaterial. The question here is the title to this money, and the misconduct, if any, by Mr Birdsall, seems to me cannot be an issue. The result would be the same whether this money came into his possession by aggravated, wrongful acts, or otherwise. The only issue is whether the money deposited in this bank was his money or her money, and whether it was deposited with her consent or not, if she could give consent, and whether it has been

(Testimony of Mary Neville.)

paid back properly, but how she became acquainted with him and matters of that kind it seems to me are entirely irrelevant.

MR. PALMER: We have pursued him and he has answered and the case is set for trial, and we are now proceeding with the trial and we are asking judgment against him and also against the bank. It doesn't make any difference whether he is represented in court or not, we are entitled to introduce our proof and get our judgment against him.

MR. DUNNIGAN: That would be entirely true, your Honor, but the history of their acquaintance would not have any bearing upon the title to the money.

THE COURT: I will hear some of it anyway. Who filed the answer for the defendant?

MR. PALMER: Messrs. Davis, Rush and Macdonald appeared for the defendant, your Honor.

THE COURT: They are not present here, this morning?

MR. PALMER: No sir. I know that they knew of the trial, I don't know that we have served a written notice on them.

THE COURT: I will overrule this objection. I don't know how far I will let the matter go. This question cannot do anybody any harm and it may be relevant.

A In Long Beach. I afterwards returned to Texas

(Testimony of Mary Neville.)

with my mother and sister and a friend of ours. We returned in an automobile.

I met Birdsall in Texas and contracted a marriage with him there. We were regularly married and we came back out here and stayed about a month. We first went to the Lankershim Hotel and then moved from there to the Stillwell Hotel. We were married on September 9th, 1920.

I afterwards separated from him when he was arrested, which I think was on the 8th of October, 1920, in San Francisco.

When I was living in Los Angeles mother sent me two checks, and there was an automobile given to me by Mr Selover. I got the first check soon after I came out here, I think.

Q I show you a paper, Miss Neville, and will ask you if that is the first check you speak of that you received from your mother (showing paper to the witness)?

A Yes sir, my mother sent it to me through the mail. It is signed 'Kate Neville', that is my mother.

I endorsed the check and gave it to the defendant Birdsall, to deposit in the Continental National Bank for me."

The check was here introduced, received and read in evidence as Plaintiff's Exhibit 10, and is in the words and figures following, to-wit:

"Alpine, Texas, September 14, 1920. First National Bank. Pay to Mary Neville Birdsall, or order, \$500,

(Testimony of Mary Neville.)

Five Hundred Dollars." Signed "Mrs. Kate Neville." Endorsed "Mary Neville Birdsall." "Pay to Federal Reserve Bank of San Francisco or *oder*. Prior endorsements guaranteed, September 21, 1920. The Continental National Bank, Los Angeles, Cal., W. D. Howell, Cashier."

"Q Now, after you delivered that check to him did he bring you back a pass book?

A Yes sir, a pass book and a card to sign, I did not sign that card and it later disappeared. The bank book that he brought back to me had the \$500 entry in it. It had my name on it 'Mary Neville Birdsall.' It did not have Fred Birdsall's name on it.

Q I show you this book, which is plaintiff's Exhibit 7 for identification and will ask you whether or not you can tell whether that is the book that your husband brought to you or that Fred Birdsall brought you after you gave him this check (handing book to the witness)?

A No sir, I cannot tell. The book that he brought me did not have his name on it. He was known to me at that time by the name of 'Fred Birdsall'. He said his name was really Alfred Ward Birdsall, but when he went into the army they changed it to 'Fred Birdsall.' I went with him a few days later and signed another card.

Q When you went to the bank did he introduce you to anyone?

(Testimony of Mary Neville.)

A He introduced me to Fred Nichols, who he said was president. Mr. Nichols just spoke to me, I suppose. He presented me with a card at that time to sign. He gave me another card and I signed that one.

Q I show you this paper (handing paper to witness) Is that the card you signed at that time?

A Yes sir.

Q The card was here offered and received in evidence and is in the words and figures following to-wit:

“Authorized signature of _____ individual
for the Continental National Bank of Los Angeles.
Sign here.

Mary Neville Birdsall. (Signed.)

Address, 1015 M- S- Bldg.

Business

Introduced by

Accepted by

Dated, 9-21 1920. Remarks: F. H. N.

Form, 209. 2-4-20. 2 M.”

“MR. PALMER: Is that your signature there (indicating)? You signed that?”

A Yes. At the time I signed that card I did not see Fred Birdsall sign a card. I did not then see a card that he had signed. I afterwards saw it in the bank later, on October 14th, after we had separated. I afterwards saw it in the Federal Grand Jury room.

MR. PALMER: I show you this card and will ask you first if you have seen Fred Birdsall write?

(Testimony of Mary Neville.)

A Yes sir, I have seen him sign his name. I am familiar with it. I know his signature when I see it. That is his signature. That is the card that Mr. Nichols showed me in the bank on October 14th."

The card was then received in evidence as Plaintiff's Exhibit 9-b, and was handed to the jury for inspection and is in the words and figures following, to-wit:

"Authorized signature of _____ individual.
For the Continental National Bank of Los Angeles.
Sign here: Fred Birdsall. _____ or
Address, 1015 Marsh Strong Building.
Business:
Introduced by F. H. N. 1 Accepted by
Date 9-21-1920. Remarks F. H. N.
Form 209 2-4-20 2M"

"Q Now after that time did you get another check payable to you, the next one I mean?

A Yes sir, from Mr. Selover, for \$2500. That was made payable to me. It was the price of an automobile. He handed it to me and I took it down to the bank that same afternoon and deposited it.

I did not make out a deposit ticket. Birdsall did. The deposit ticket was made out in my name. It did not have his name on it. I endorsed that \$2500 check, wrote my name on the back of it. I did not see him write his name on the back of it. I did not know of his putting any money in there at that time.

Q I show you this paper and ask you if you have seen that before?

(Testimony of Mary Neville.)

A Yes sir, I received it from my mother. That is signed by my mother and endorsed by me. All of that handwriting on there is my handwriting.

Q For deposit only."

The check shown the witness was here received in evidence and as plaintiff's exhibit 11 and was read to the jury and is in the words and figures following, to wit:

Alpine, Texas, Sept 25 1920 No.—

THE FIRST NATIONAL BANK. 88 - 467

Pay to Mary Neville Birdsall or order \$500.00.

Five Hundred - - - - - Dollars.

For ————— (N. P.

(16-78) (1)

FIRST NATIONAL BANK. Alpine, Texas

PAID Oct 8 1920.

- - - - -
Endorsement:

For deposit Only, Cont'l Nat'l Bank, Mary Neville Birdsall

PAY TO THE ORDER OF ANY BANK, BANKER OR TRUST CO. Prior endorsements Guaranteed Oct - 7 1920 LOS ANGELES BRANCH 16 - 16 FEDERAL RESERVE BANK OF SAN FRANCISCO 16-16

Pay to the Order of any Bank or Banker

Prior Endorsements Guaranteed EL PASO BRANCH FEDERAL RESERVE of Dallas, EL PASO, TEXAS."

(Testimony of Mary Neville.)

“Q Did you know about Fred Birdsall ever paying any money into the Continental National Bank?

A The only thing I know is that he told me he moved his Long Beach account up there to the Continental National Bank. He formerly lived in Long Beach.

Q Did you at any time have your address at 1015 Marsh Strong Building?

A That is where my mother sent my mail. That was Mr. Strong's office. Mr. Birdsall was connected with that office in the real estate business. It was the office of Strong, McGrath & Sullivan.

Q I show you, Miss Neville, a number of checks.

MR. DUNNIGAN: I am prepared to stipulate that those checks were signed by the two parties as they appear to be signed and cashed by the bank, if that will shorten the examination any.

MR. PALMER: Out of that one account.

MR. DUNNIGAN: Well, the checks speak for themselves. I don't suppose you want to go into how the bank credited them, but that the checks were paid by the bank and credited to the parties who signed them or their orders. Of course the issue is what account they should be charged to. I am not asking you to stipulate to that but I will stipulate that those checks were signed and that the bank paid them.”

The checks were then received in evidence and read to the jury as Plaintiff's Exhibit 5 and are in the words and figures following:

CONTINENTAL NATIONAL BANK 16-78

of Los Angeles

(CUT) LOS ANGELES Sept 21 1920

PAY TO THE ORDER OF C. H. WOLFELT
CO \$53.15 Fifty Three Dollars and 15-100 DOL-
LARS

No. Mary Neville Birdsall.

- - - - -

(Endorsement on back:)

MERCHANTS NATIONAL BANK, Through Los
Angeles Clearing House. Sep 23 1920 1015 Marsh
Strong Bldg. 671 Pay to the order of Merchants
National Bank, Los Angeles, Cal. THE BOOTE
C. H. Wolfelt Co. 6

CONTINENTAL NATIONAL BANK 16-78

of Los Angeles.

LOS ANGELES Sept 22 1920

PAY TO THE ORDER OF N. B. Blackstone \$7.50

No. SEVEN 50-100 - - - - - DOLLARS.

Mary Neville Birdsall

(Endorsement on back:)

Pay to the Order of Merchants National Bank
Los Angeles, Cal. Sep 23 1920 N. B. Blackstone
Co. Los Angeles 101 Merchants National Bank
Through Los Angeles Clearing House Sep 24 1920
#60195 1015 Marsh Strong Blding L A C

OK U.H.M.

CONTINENTAL NATIONAL BANK 16-78

of Los Angeles.

(CUT) Los Angeles Sept 2nd 1920

PAY TO THE ORDER OF N. B. Blackstone Co.

\$52.95-100 Fifty-two - -95-100 - - DOLLARS

No. 3

Mary Neville Birdsall

1015 Marsh Strong Bldg.

(Endorsement on back:)

Pay to the order of Marchants National Bank Los Angeles, Cal. Sep 23 1920 N. B. Blackston Co. Los Angeles 101 60195 Merchants National Bank Throgh Los Angeles Clearing House. (Signature not legible.) Sept 24, 1920.

CONTINENTAL NATIONAL BANK 16-78

of Los Angeles.

LOS ANGELES Sept 22 1920

PAY TO THE ORDER OF N. B. Blackstone Co.

\$202.00 Two Hundred and Two - - - 00-100

DOLLARS.

Fred Birdsall

No.

1015 Marsh Strong Bldg.

(Endorsement on back:)

Pay to the order of Merchants National Bank Los Angeles, Cal. Sep 23 1920 N. B. Blackstone Co. Los Angeles 101 Merchants National Bank Through Los Angeles Clearing House Sep 24 1920 Boyl 9 - 20 - 20 2401.

CONTINENTAL NATIONAL BANK 16-78
of Los Angeles

(CUT)

Los Angeles Sept. 22nd 1920

Pay to the order of S. Nordlinger & Sons \$9.00

Nine - - - - - - - - -oo - 100 - -DOLLARS.

No.

Fred Birdsall

(Endorsement on back:)

52 Pay to the order of Farmers & Merchants Na-
tional Bank Los Angeles, Cal. S. Nordlinger & Sons.
Farmers & Merchants National Bank of Los Angeles
Pay through Clearing House only No. 1 Sept 24
1920 C E M 417 So St Andrews.

CONTINENTAL NATIONAL BANK
of Los Angeles.

Los Angeles, Cal Sept. 22nd 1915

Pay to the order of Olive St Garage \$5.20

Five - - - - - - - - - DOLLARS.

No.

Fred Birdsall.

(Endorsement on back:)

Pay to the Order of Bank of Italy, Los Angeles,
Cal. Olive Street Garage Citizens National Bank
66 Sep 23 1920 Los Angeles Pay through Los An-
geles Clearing House Bank 20 of Italy.

CONTINENTAL NATIONAL BANK 16-78

(CUT) of Los Angeles.

Los Angeles, Cal. Sept 24 1920

Pay to the order of CASH - - - - - \$25.00

Twenty-five and 00-100 - - - - - DOLLARS.

No.

Fred Birdsall.

(Endorsement on back.) (None.)

CONTINENTAL NATIONAL BANK 16-78

of Los Angeles.

Los Angeles, Cal. Sept 25th 1920

Pay to the order of N. B. Blackstone Co. \$26.95

Twenty-six - - - - - 95-100 DOLLARS.

No.

Fred Birdsall.

(Endorsement on back:) Pay to the order of Merchants National Bank Los Angeles, Cal. Sep 27 1920 N. B. Blackstone Co. Los Angeles 101 Merchants National Bank Through Los Angeles Clearing House Sep 28 1920 1015 Marsh Strong Bldg.

(Signature not legible.)

CONTINENTAL NATIONAL BANK 16-78

of Los Angeles.

(CUT)

Los Angeles, Cal. Sept 27 1920

Pay to the order of CASH \$25.00

Twenty-five - - - - - -00-100 - - DOLLARS.

No. 21

Fred Birdsall.

(Endorsement on back:)

Pay to the order of Bank of Italy Los Angeles,
Cal. The Stillwell Hotel Citizens National Bank
66 Pay through Los Angeles Clearing House Sep
28 1920 Bank 20 of Italy.

CONTINENTAL NATIONAL BANK 16-78
of Los Angeles.

(CUT)

Los Angeles, Cal Sept 27th 1920
Pay to the order of Skinner & Co. \$2.50
Two - - - - 50-100 DOLLARS.
No. 22

Fred Birdsall.

(Endorsement on back:)

Pay to the order of Security Trust & Savings Bank
Los Angeles, Calif. Skinner & CO. Security Trust
& Savings Bank. Pay Farmers & Merchants Na-
tional Bank Sept 29 1920 51 Through Clearing
House only 51 Los Angeles, Cal.

CONTINENTAL NATIONAL BANK 16-78
of Los Angeles.

(CUT)

Los Angeles, Cal. Sept 27th, 1920.
Pay to the order of Olive St. Garage, \$7.90
Seven - - - - 90-100 - - DOLLARS.
No. 25

Fred Birdsall.

(Endorsement on back:)

Pay to the Order of Bank of Italy Los Angeles,
Cal. Olive Street Garage Citizens National Bank 66
Pay through Los Angeles Clearing House Sep 29
1920 Bank 20 of Italy.

CONTINENTAL NATIONAL BANK

of Los Angeles.

(CUT)

Los Angeles, Cal. Sept 28th 1920

Pay to the Order of CASH \$25.00

Twenty-five - - - (4) - - -oo-100 DOLLARS

No.

Fred Birdsall.

(Endorsement on back:)

Pay to the order of Bank of Italy Los Angeles,
Cal. The Stillwell Hotel Citizens National Bank
66 Pay through Los Angeles Clearing House Sep
29 1920 Bank 20 of Italy.

CONTINENTAL NATIONAL BANK 16-78

of Los Angeles.

(CUT)

Los Angeles, Cal. Sept 29th 1920

Pay to the order of CASH - \$25.00

Twenty-five - - - - -oo-100 DOLLARS

No.

Fred Birdsall.

(Endorsement on back:)

Citizens National Bank Pay to the order of Bank
of Italy Los Angeles, Cal. The Stillwell Hotel. Citi-

zens National Bank 66 Pay through Los Angeles
Clearing House Oct 1 1920 Bank 20 of Italy.

CONTINENTAL NATIONAL BANK
of Los Angeles.

(CUT)

Los Angeles, Cal. Sept 29th 1920
Pay to the order of Southern Pacific R. R CO.
\$400.73 Four Hundred and 73-100 - DOLLARS.
No.

Fred Birdsall.

CERTIFIED

(Across face of check:) Pay \$400 and 73 Cts. Good
when properly endorsed Sep 29 1920 Continental
National Bank Los Angeles, Cal By ...Asst. Cashier.
(Endorsement on back:)

208-B Pay to the order of Farmers & Merchants
National Bank of Los Angeles, Cal. Southern Pacific
Co. M. L. Ryder, Agent Farmers & Merchants
National Bank of Los Angeles Pay through Clearing
House only Oct 2 1920 No. 1

CONTINENTAL NATIONAL BANK 16-78
of Los Angeles.

(CUT)

Los Angeles, Cal. Sept 30th 1920
Pay to the order of BULLOCKS \$308.45
Three Hundred and Eight & 45-100 DOLLARS.
No. 154
1015 Marsh Strong Bldg.

Fred Birdsall.

(Endorsement on back:)

-- 87 -- Pay to the order of First National Bank
Los Angeles, Cal Bullock #88375 (in pencil): C.
F. Kemp #6988 Paid Sep 16-30-16 1920 Bul-
lock's (Stamp not legible).

CONTINENTAL NATIONAL BANK

of Los Angeles.

(CUT)

Los Angeles, Cal. Oct. 1st 1920

Pay to the order of CASH \$25.00

Twenty-five - - - - - oo-100 - DOLLARS

No. 156

Fred Birdsall.

(Endorsement on back:)

Pay to the order of Bank of Italy Los Angeles,
Cal. The Stillwell Hotel. Citizens National Bank
66 Pay Through Los Angeles Clearing House Oct
4 1920 Bank 20 of Italy.

CONTINENTAL NATIONAL BANK 16-78

of Los Angeles.

(CUT)

Los Angeles, Cal. Oct 1st, 1920

Pay to the order of Continental Nat'l Bank of LA
\$900.76-100 Nine Hundred and 76-100 DOLLARS

No. 155 -

Fred Birdsall.

(Endorsement: None.)

CONTINENTAL NATIONAL BANK 16-78
of Los Angeles.

(CUT)

Los Angeles, Cal. Oct 2nd 1920

Pay to the order of Cash \$25.00

Twenty-five - - - - - 00-100 Dollars.

No. 159

Fred Birdsall.

(Endorsement:)

Citizens National Bank 66 Pay Through Los Angeles
Clearing House Oct 5 1920 Bank 20 of Italy.

CONTINENTAL NATIONAL BANK 16-78
of Los Angeles.

(CUT)

Los Angeles, Cal. Oct. 2nd 1920

Pay to the order of A. J. Warner \$150.00

One Hundred Fifty and 00-100 - - DOLLARS.

No. 158

Fred Birdsall.

(Endorsement:)

A. J. Warner Pay to the order of Guaranty Trust
& Savings Bank Los Angeles Cal. A. J. Warner
Tailoring Co. Guaranty Trust & Sav Bank 52 Oct
4 1920 Pay through L. A. Clearing House only.

CONTINENTAL NATIONAL BANK 16-78
of Los Angeles.

(CUT)

Los Angeles, Cal Oct 3rd 1920

Pay to the order of Hotel Stillwell \$36.21

Thirty-six - - - - - \$36.21

Thirty-six - - - - - 21-100 Dollars.

No. 160

Fred Birdsall.

(Endorsement:

Pay to the order of Bank of Italy Los Angeles, Cal.
The Stillwell Hotel. Citizens National Bank 66 Pay
through Los Angeles Clearing House Oct 5 1922
Bank 20 of Italy.

CONTINENTAL NATIONAL BANK 16-78
of Los Angeles.

(CUT)

Los Angeles, Cal. Oct 4th 1920

Pay to the order of The Continental National Bank
Los Angeles, Calif.

\$2000.00 Two Thousand - - 00-100 Dollars.

No.

Fred Birdsall.

(Endorsement: None.)

CONTINENTAL NATIONAL BANK 16-78
of Los Angeles.

(CUT)

Los Angeles, Cal. Oct 4 1920

Pay to the order of Continental Nat'l Bank \$35.00

Thirty-five - - - - - 00-100 Dollars

No. 164

Fred Birdsall.

(Endorsement: None.)

CONTINENTAL NATIONAL BANK 16-78
of Los Angeles.

(CUT)

Los Angeles, Cal. Oct. 4th 1920

Pay to the order of Hotel Alexander \$25.80

Twenty-five - - - 80-100 - - DOLLARS.

No.

Fred Birdsall.

(Endorsement:)

Pay to the order of Exchange Nat'l Bank Long
Beach, Cal. Alexander Hotel S. W. Alexander

Pay only through L. A. Clearing House Oct 6 1920

Los Angeles Branch 1616 Federal Reserve Bank of
San Francisco 16-16 Pay any bank or banker or

order, previous endorsements guaranteed 90-116 Oct

4 1920 90-117 2 Exchange National Bank Long

Beach Cal W. J. Gardiner, Cashier.

CONTINENTAL NATIONAL BANK 16-78
of Los Angeles.

(CUT)

Los Angeles, Cal. Oct 4th, 1920

Pay to the order of CASH \$10.00

Ten - - - 00-100 - - - DOLLARS.

No. 162

Fred Birdsall.

(Endorsement:)

Pay to the order of Bank of Italy, Los Angeles,
Cal. The Stillwell Hotel Citizens National Bank 66

(Testimony of Mary Neville.)

Pay Through Los Angeles Clearing House Bank 20
of Italy.

CONTINENTAL NATIONAL BANK

of Los Angeles.

(CUT)

Los Angeles, Cal. Oct. 5th, 1920

Pay to the order of Hotel Stillwell \$6.05

Six - - - - - 05-100 Dollars.

No. 165

Fred Birdsall.

(Endorsement)

Pay to the order of Bank of Italy Los Angeles, Cal.
The Stillwell Hotel. Citizens National Bank 66 Pay
through Los Angeles Clearing House Oct 7 1920
Bank 20 of Italy.

“Q BY MR. PALMER: Did you at any time go
to the bank to inquire about the state of your ac-
count?

A Yes sir, October 14, 1920, with my mother, Mr.
Alexander and Mr. Hall. The day before I was talking
to Mr. Birdsall and told him I was going down to
see about my account. He was in Mr. Strong's office.
They had just brought him back from San Francisco.
He said, well, that I would find it \$500 short, that he
drew that out to pay a lawyer in San Francisco to
get him out on habeas corpus and I asked him if

(Testimony of Mary Neville.)

they would cash his check on my account, and he said yes, and I *thoug* thought that was funny, so I went down next morning to see about it.

I had never given him permission to draw checks on my account.

I never told any member of the bank or any one, that they might cash his checks drawn on my account. I did not know that he was drawing checks against my account and that the bank was paying them out of my account until that day, until he told me about the \$500.

After he told me that I went to see the bank, with my mother, Mr Alexander and Mr Hall. Mr. Hall was a Federal Investigator. I had a conversation with Mr. Nichols, the president of the bank, with regard to the account. I think Mr. Hall was the one that we had come to see about it, and he said that the money was all gone, Mr. Birdsall had already sent in more checks than they had money for and said it was a joint account, and I told him I didn't know that it was a joint account and that I had always thought until then that it was my own personal account, and that Birdsall had told me it was.

Q Did you have any talk authorizing your husband to draw a check payable to Nordlinger, for a present, or something of that kind?

A Yes. We were buying a present for one of his friends, bankers, and he wanted me to write the check

(Testimony of Mary Neville.)

and I told him no, that I was not making the present, that I didn't know the people.

Q BY MR. PALMER: Did you ever see the pass book on which deposits are entered that was issued by the bank to you after the time Birdsall brought it to you with your name on it alone and this first \$500?

A The second time I saw it was when I went to the bank to see about my account, on the 14th of October, with my mother, Hall and Alexander. At that time the name 'Fred Birdsall' was on the books. That is the last time I was there after he had been arrested. At that time the book was like it is now. I never saw it before when the name 'Fred Birdsall' was on it until the 14th of October. I didn't know that it was on there before that. I did not authorize the bank to put that on, or anybody at the bank to do it."

The bank book referred to and shown the witness was here received in evidence and read to the jury as plaintiff's exhibit 7, and is in the words and figures following, to-wit:

Dr.

CONTINENTAL NATIONAL BANK

Los Angeles, Calif. Fred Birdsall Cr.

In Account with or Mary Neville Birdsall.

1920

Sept 21 FHN 500. - - - -

(Testimony of Mary Neville.)

Oct	1	FHN	2500	----	
Oct	4	20	H	500	----
Oct	4	20	H	500	----
Oct	18	1920	BALANCE	9.85	

“Q You did not go to the bank and put the \$500 in on October 14th, did you?

A No sir, I delivered that to Fred Birdsall.

Q Tell the jury now whose automobile it was that was sold?

A My mother’s.”

It was here stipulated that the price of the automobile belonged to the plaintiff.

MR DUNNIGAN: The check was hers. Unless she parted with it it would be her money.

CROSS-EXAMINATION

Q Referring to the first check, dated September 14, which you identified as having been endorsed by you, and which appears to have been deposited in the Continental Bank on the 21st of September, how long before the 21st of September, did you sign your name on the back of that check and hand it to Mr. Birdsall?

A I do not remember. I have no specific recollection of that.

Q How long after you handed the check to Mr. Birdsall did he come to you with the bank book and a card?

A I don’t remember. Oh, it was a few days later. I am sure about that.

(Testimony of Mary Neville.)

Q How long after he showed you the bank book and asked you to sign the card which you did not sign, did you go to the bank and sign the card?

A Two or three days later.

Q Do you know whether you signed the card in the bank before or after the 21st of September?

A No, but that is the date there.

Q You have no recollection of the date at all. How soon after you received the check did you hand it to Mr. Birdsall?

A I don't remember. I don't remember if I kept it a while. Mr. Birdsall brought me the signature card and the handbook at the hotel. He never brought me a card at Strong's office in the Marsh Strong Building, where I received my mail.

I was in the hotel when I gave him the first check. He brought the letter to me from the Marsh Strong Building. I was in Mr. Strong's office in the Marsh Strong Building many times.

Q Have you a personal recollection of any sums of money having been deposited to your credit other than the two checks of your mother for \$500 and the check that you received for the automobile for \$2500?

A No sir.

Q Those are the only sums you have *been* any knowledge of?

A Those are the only sums that I know about having been deposited in my bank.

Q BY MR. DUNNIGAN: You say that when

(Testimony of Mary Neville.)

the \$2500 was deposited in the bank you accompanied your husband.

A Yes sir.

Q Did you accompany him to the teller's window?

A Yes sir. It was not given to the president. The bank was closed. It was after hours. I knew Mr. Nichols and had met him before. I never talked to him but twice, only once before the trouble came up. He sat on the side of the bank where the officers have desks. It was on the opposite side of the bank that this \$2500 was turned into the bank. That is where the tellers' cages are. The teller took the check after hours. Mr. Birdsall did not have this book with him at the time. He got a deposit slip.

He made it out himself. I did not see it any more. He made out one and they gave him a duplicate. Up until then those were the only two occasions on which I was in the bank.

Q Do you recall purchasing anything about the 22nd of September at Blackstone's amounting to a couple of hundred dollars?

A Blackstone's?

Q Yes.

A Yes sir. Mr. Birdsall was with me and he drew a check at that time for \$202 to pay that bill. That was for clothes for me. I did not know that he was drawing it against this money that I had turned over to him.

Q Now on the same day that you drew a check

(Testimony of Mary Neville.)

for \$52.95 to Blackstone's. For your information it appears that Mr. Birdsall drew a check for \$202, and that you drew two checks, one for \$52.95 and one for \$7.50, and you were both there present when those checks were drawn.

A He was not there when I wrote that for \$7.50. All these checks were given for purchases by myself. He was there when I wrote the \$52.95 check, and I was there when he wrote the \$202 check.

Q Now again, on the 25th, Mr. Birdsall appears to have drawn a check to N. B. Blackstone & Company for \$26.96. Do you recall what that was for? Was it for some of your purchases?

A Yes sir. I didn't ask him to draw the check. He was with me when I made the purchase.

Q On the 20th of September, Mr. Birdsall seemed to have drawn a check on Bullock's for \$308.45. Do you recall that?

A Yes sir, that was for some trunks he bought.

REDIRECT EXAMINATION

BY MR. PALMER: At this time when you were in the bank after hours, when was that?

A That was the day we deposited the \$2500 check. He made out the slip. It was in my name. His name was not on it."

At this time the plaintiff offers and there was received in evidence three deposit slips as Plaintiff's Exhibit 12. Said deposit slips were in the words and figures following, to-wit:

Deposited with
 CONTINENTAL NATIONAL BANK
 OF LOS ANGELES

Los Angeles, Cal.

Oct 4, 1920

Fred Birdsall

	Dollars	Cts.
Gold		
Silver		
Currency		
Checks	500 00	
Bk		
(1)		
Total	500 00	
---	0	---

Deposited with
 CONTINENTAL NATIONAL BANK
 OF LOS ANGELES.

Los Angeles. Cal.

Oct. 1, 1920

Mary Neville Birdsall,

Checks	2500 00
(1) Total	2500 00

(Endorsed on back of slip &, 867.77

--- 0 ---

Deposited with
 CONTINENTAL NATIONAL BANK
 OF LOS ANGELES

Los Angeles, Cal.

Fred Birdsall or
 Mrs Mary Neville Birdsall.

Checks 500 --

(Testimony of Mary Neville.)

(Rubber stamp)

Paid Sep 21 1920

Continental National Bank

Los Angeles, Cal. Newy Total

--- o ---

"Q BY MR. PALMER: Now, you were asked about your intent and purpose in coming to California. When you started to California you believed that you were the lawful wife of Fred Birdsall, didn't you?

A Yes sir.

Q And afterwards you learned that you were not his lawful wife, did you not?

MR DUNNIGAN: That is objected to as not the best evidence. The record is the best evidence and it calls for a conclusion of the witness.

THE COURT: It is agreed that Birdsall was not her husband.

MR. PALMER: We have the record of the proceeding in which the marriage was annulled in this county.

"Q You did bring an action against Birdsall to annul your marriage with him, didn't you?

MR DUNNIGAN: That is *object* to as immaterial.

THE COURT: The objection is overruled.

A Yes sir.

Q BY MR. PALMER: In this county?

(Testimony of Mary Neville.)

A Yes sir.

Q Now when you got those goods at Blackstone's, when Fred Birdsall drew a check there for \$202, was there anything said by him about whether or not he would buy your clothing?

MR. DUNNIGAN: That is objected to as immaterial.

THE COURT: Overruled.

A No. He said he would write a check. I did not see the check he wrote.

Q Now, on that same day I understand that you drew a check for goods there for \$52.95.

A Yes sir. I don't know how it happened. He was not present when I wrote the \$7.50 check. I was expecting him to pay for the \$202 worth of goods. I did not know that check was paid out of my account.

Q BY MR. DUNNIGAN: Did you at any time speak to any teller or any officer in the bank or give them any direction as to any of these deposits you have testified about?

A No sir. I never made out a deposit slip. I do not think there was anything said by Mr. Birdsall in my presence at the bank, and in the presence of any teller, employe or officer of the bank respecting these deposits.

(Testimony of Kate Neville.)

KATE NEVILLE, a witness called on behalf of the plaintiff being first duly sworn, testified as follows:

My name is Kate Neville. I am the mother of Mary Neville just on the witness stand. I reside in Texas. I am her guardian in Texas. She became 18 years of age on October 30th, 1920. I am acquainted with Mr. Strong, that is, I have met him.

I went with my daughter to the bank after the arrest of Fred Birdsall to find out about her account. It was some time in October, 1920."

It was here stipulated that this visit was after the last deposit to the account in question, after the last check was put in.

THE WITNESS: Mr. Alexander, Mr. Hall and my daughter were with me. We saw Mr. Nichols.

Q And what if anything was said at that time about the account by Mr. Nichols.

A Well, there was not very much said. Mr. Hall, I believe, talked to him and he informed us that the money was all gone and that Mr. Birdsall had checked it out and had turned in more checks than they had money there; that it was a joint account, I believe. He also said that it was a joint account, I believe.

Q Did you hear Mary say anything to him there at that time about a joint account?

A Well, she didn't know. She said she didn't know that it was.

It was here stipulated that at that time the bank offered to honor Mary's check for \$9.85 or whatever

(Testimony of Maurice J. Wolfe.)

the balance showed, and that it was refused, and that the bank refused to pay more than \$9.85 but that it offered to pay that.

The plaintiff here rested her case

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“MAURICE J. WOLFE, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

My full name is Maurice J. Wolfe. I am assistant cashier of the Continental National Bank. In September and October of 1920 I was auditor.

Q I will ask you if you ever made an examination of the records of the bank with respect to any account which it may at any time have had after the first of the year 1920, or at any time as a matter of fact, with Mary Neville Birdsall, Fred Birdsall, and jointly as between the two?

A I have.

Q Has the bank ever had upon its books any account with Mary Neville Birdsall alone?

A No, they have not.

MR. PALMER: We object to that, if the court please, as irrelevant and immaterial. The bank has no right to take the check of Mary Birdsall, payable to her, and endorsed by her only, and open an account with that check with any one else or in any one else's name without her authority, and we object to their putting in testimony here to show how they have manufactured a defense.

(Testimony of Maurice J. Wolfe.)

MR. DUNNIGAN: I don't think counsel should use the expression in the presence of the jury that we have manufactured a defense.

MR. PALMER: I will withdraw that.

MR. DUNNIGAN: Counsel did not mean it but I do not think that it ought to go without challenge. The testimony is negative, if your Honor please, and this is only a officer of the bank, and the regular books of the bank and their condition is always competent evidence. As to the right of the bank to accept a check in the possession of Mr. Birdsall and properly endorsed, although originally payable to Mary Neville Birdsall and treated as Mr. Birdsall's property, I think there is no question. Our Code provides that a minor may pass title by endorsement to a negotiable paper, and I know of not criticism of that code section in the authorities; so that if this check were presented Mr. Birdsall was ostensibly the owner of it and held the legal title to it under the testimony at least of Mary Birdsall, because she said she endorsed it and delivered it to him, and a secret instruction would not bind the bank. Now if that account was opened in that way and if that instruction was given, neither the deposit slip nor the bank account nor the bank book nor the signature card nor any one of these circumstances would be conclusive. I think there is hardly any question about that being the law. The real question is what was the agreement between the bank and Mr. Birdsall when he made that deposit,

(Testimony of Maurice J. Wolfe.)

and the deposit slip and the bank book and the signature card are merely fragmentary pieces of evidence establishing that agreement, but the basic thing for the jury to decide is what was the agreement. Now the books of the bank are a circumstance as to what was done and what was the agreement. They are one circumstance along with the rest. The testimony we have is negative. I am not asking him for the contents of an account that he hasn't brought here, but as to whether the account existed. That is negative testimony and has to come in this way. If those accounts did exist I want to produce the record.

THE COURT: It seems to me that it is a self-serving declaration on the part of the bank. Unless the plaintiff knew about it, knew the condition of the books, it would not be receivable in evidence, it seems to me, except upon the theory that this is an account existing between the parties, and you say you are seeking to prove that there was no account.

MR. DUNNIGAN: I am asking if the books showed an account, not if there was an account. That would be a conclusion. I am asking as to whether the bank books showed an account. That is not conclusive on anybody. Now the plaintiff doesn't say she ever made a single deposit.

MR. PALMER: Oh, yes.

MR. DUNNIGAN: No; I appeal to the record on that. She was there only once when a deposit was made --

(Testimony of Maurice J. Wolfe.)

MR. PALMER: Oh, yes.

MR. DUNNIGAN: But she didn't speak to any one and didn't make out the ticket and didn't do anything.

THE COURT: I will sustain the objection.

MR. DUNNIGAN: I desire to prove by this witness that the bank books or the regular books of account of the bank contained no account with Mary Neville Birdsall or with Fred Birdsall or any other account excepting the account with Mary Neville Birdsall or Fred Birdsall -- or, rather, the reverse, Fred Birdsall or Mary Neville Birdsall -- and that that was the only account on the books of the bank so far as those books show.

THE COURT: I will sustain the objection.

MR. DUNNIGAN: All right. I understand that all exceptions are deemed to be taken.

THE COURT: You must take your exceptions.

MR. DUNNIGAN: Then I desire to reserve an exception to the Court's ruling. It does not seem necessary, and I do not desire to be impertinent and don't want to be in that position.

Q Have you the original book of account of the bank with Mary Neville Birdsall and Fred Birdsall?

A I have a copy as well as the original. This is the original ledger sheet.

Q I will ask you if you can identify the original deposit ticket that corresponded to the first deposit.

(Testimony of Maurice J. Wolfe.)

Have you those other two deposit tickets we had there this morning?

A I have the other, yes.

THE CLERK: It is a part of plaintiff's Exhibit 12.

A This deposit slip is in the handwriting of Don Curran, note teller at the Continental National Bank."

The deposit slip was here received in evidence and read to the jury as defendant's Exhibit A.

"Deposited with
CONTINENTAL NATIONAL BANK
OF LOS ANGELES.

Los Angeles, Cal.

Sept 29 1920.

Fred Birdsall,

	Dollars	Cts.
Gold		
Silver		
Currency		
Checks		
Bk	400	- - "

"The next item is the slip of October 1, 1920, that has been introduced in evidence, reading to Mary Neville Birdsall, and that was credited on the bank's books to the account which you have just shown me of - - Fred Birdsall or Mary Neville Birdsall.

MR. DUNNIGAN: The next are two slips of October 4; one has already been introduced in evidence being for \$500 in the name of Mary Neville Birdsall, and the other - -

MR. PALMER: Is in Fred's name. All right. I don't care to see it.

(Testimony of Maurice J. Wolfe.)

MR. DUNNIGAN: That is dated October 2, 1920, deposited to the credit of Fred Birdsall, \$500.

Q Now that was entered under what date?

A The 4th. Those are all the deposits to that account.

Q I will ask you to examine these checks and see if the checks shown in that list were cashed by the bank. I am referring now to plaintiff's Exhibit 5 (handing checks to the witness)?

A These were all cashed by the bank, or rather, paid by the bank. They were charged to the joint account.

Q In addition to that I will show you another check and ask you if it was charged to the same account.

A This is a certified check. It belongs to the bank. It was charged originally to the account, that is, it was charged against our own records after it came back. It was charged originally to the account at the time the purchase was made.

MR DUNNIGAN: It is charged to the account when it is issued.

Q It is entered on the account?

A Originally, yes. We have it under date of September 29.

MR. PALMER: All right, go ahead and read it.

MR. DUNNIGAN: "Continental National Bank. Los Angeles, Cal., September 29, 1920. Pay to the order of Southern Pacific Company Four Hundred Dollars & 73 cents .(\$400.73). Fred Birdsall."

(Testimony of Maurice J. Wolfe.)

Stamped across the face: 'Paid \$400.73.' Certified: 'Good when properly endorsed; September 29, 1920; No. 4484, Continental National Bank, Los Angeles, California, by' - -

MR. DUNNIGAN: Endorsed on the back: '208 B. Pay to the order of Farmers & Merchants Bank, Los Angeles. Southern Pacific Company, M. L. Ryder, Agent,'

MR DUNNIGAN: Now, if the court please, I desire to offer in evidence the book account that the bank had against which these deposits were credited, showing the way they were entered on the bank's books and the way the checks were drawn. Any objection?

MR. PALMER: No, I guess not."

Defendant's Exhibit B was received in evidence and handed to the jury for inspection and is in the words and figures following to-wit:

"SHEET CONTINENTAL NATIONAL BANK

NO.

Los Angeles, Cal.

SIGNATURE.

NAME FRED BIRDSALL OR

MARY NEVILLE BIRDSALL

ADDRESS

OLD

BALANCE DATE CHECKS.

Balance Brought Forward.

500.00	Sep 23	53.15 -	
446.85	Sep 24	7.50 -	202.00 - 9.00
	Sep 24	52.95 -	

175.40	Sep 24	25.00 -		
150.40				
150.40	Sep 25	5.20 -		
145.20	Sep 28	26.95 -	25.00 -	
93.25	Sep 29	25.00 -		
68.25	Sep 29	2.50 -	7.90 -	
57.85	Sep 29	400.73 -		
57.12	Oct 1	25.00 -		
32.12				
2,532.12	Oct 2	900.76 -		
1,631.36	Oct 4	150.00 -		
1,481.36	Oct 4	308.45 -	25.00 -	
2,147.91	Oct 4	2,000.00 -	35.00 -	
112.91	Oct 5	10.00 -	36.21	25.00
41.70	Oct 6	25.80 -		
15.90	Oct 7	6.05 -		

DATE	1920	DEPOSITS	DATE	BALANCE.
Sept 21		500.00	Sep 21	500.00
Sep 23			Sep 23	446.85
Sep 24			Sep 24	175.40
Sep 24			Sep 24	150.40
Sep 25			Sep 25	
			Sep 25	145.20
Sep 28			Sep 28	93.25
Sep 29			Sep 29	68.25
Sep 29		400.00	Sep 29	57.85
Sep 29			Sep 29	57.12
Oct 1			Oct 1	32.12

(Testimony of Maurice J. Wolfe.)

Oct 2	2500.00	Oct 2	2,532.12
Oct 2		Oct 2	1,631.36
Oct 4		Oct 4	1,481.36
Oct 4	500.00	Oct 4	
Oct 4	500.00	Oct 4	2,147.91
Oct 4		Oct 4	112.91
Oct 5		Oct 5	41.70
Oct 6		Oct 5	15.90
		Oct 7	9.85

CROSS-EXAMINATION

BY MR. PALMER:

Q You have no knowledge at all about the method or about who came to open the account there, have you?

A No sir, not any personal knowledge.

Q Nor what was said at the time?

A Not personally.

Q When did you first see this deposit ticket that was made out in the name of Fred Birdsall or Mary Birdsall?

A Well, that is a pretty hard question to answer. My work is such that I may have passed that thing by fifty times. I first remember seeing it along about October 15th or 16th. It was called to my attention by a request that we produce the various evidence for the trial that was to come or the trouble that was coming up. I don't recall exactly. I remember Mary Birdsall came down there and raised a question as to

(Testimony of Maurice J. Wolfe.)

whether there was a joint account. I do not recall the date. I know it was on a Saturday and was talked to me personally. I do not know what was said when the deposit ticket was prepared, or who was present. We have various departments in the bank and the New Account Department would handle new accounts. In the absence of the New Account Department one of the senior officers would take care of the accounts. The deposit ticket was written by Mr. Nichols. He was the president of the bank at the time. I am judging from the appearance of the handwriting. That is all I know about it.

FRANK H. NICHOLS, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

My name is Frank H. Nichols. My present occupation is chairman of the State Federations Welfare Board. In October and September 1920, I was president of the Continental National Bank. I recall opening an account with that bank by Mr. Birdsall.

MR. DUNNIGAN: I show you a deposit slip with a stamp on it, the slip itself not being dated. It is not marked on the back. It is the first slip in date, and it is a part of your exhibit. It is a September 21st deposit. In whose handwriting is that (handing paper to the witness)?

A Mine. I remember the circumstance. Mr. Birdsall was present. He wanted it entered as a joint account with his wife, Mary Neville Birdsall.

(Testimony of Frank J. Nichols.)

Q I show you a pass book marked Defendant's Exhibit No. 7 in this case, and ask you in whose handwriting the upper portion of the names of the depositors is entered?

A It is mine. The first entry in that book of \$500 on September 21, is in my handwriting. It was made out on September 21. Mary Neville was not present. I prepared a signature card at the time.

Q I will show you Plaintiff's Exhibit 9-B and ask you if you recognize it?

A I do. I will say the signature on there is that of Fred Birdsall. The balance of the card is in my handwriting, including the date. I don't know what kind of an item the \$500 represents.

Q Do you remember whether or not Mary Neville Birdsall or Mary Neville came into the bank and turned in a signature card?

A I don't recall whether she turned it in or he.

Q I show you a signature card, exhibit 9-A and ask you if you --

A Everything written on there, aside from the signature, is my writing. The signature is her's.

Q I show you a deposit ticket for \$2500 that has been introduced in evidence here and ask you to refer to the deposit book and see whether you received that deposit or not (handing paper to the witness)?

A I did. I received it from Mr. Birdsall. I made the entry in the book. He presented it to me at the time. The Plaintiff was not present at the time, that

(Testimony of Frank J. Nichols.)

is, now, I am not going to say positively. I never saw her but once, at the time of this trouble.

Q That is, up prior to the time she called there with several other gentlemen and questioned the action of the bank, how many times had you seen her?

A Once. Mr. Birdsall brought her in.

Q What was the purpose of the visit or the subject of the conversation, if any?

A He introduced her to me, and I think that is when the signature card was handed in, but I am not positive as to that.

Q Can you tell from the book who took the other three deposits here? You say you took the first and the other \$2500 (handing book to the witness).

A No other deposits are mine. I would say that Hall received one of them. He is a teller. It looks like his name, I don't know. I am not sure of their initials.

Q So far as you know was there ever more than one pass book issued?

A None other.

Q To Mary Birdsall or Fred Birdsall or either of them or with their names on it?

A None but the one to my knowledge.

Q That pass book, showing the depositors, Fred Birdsall and Mary Birdsall, were the words 'Fred Birdsall' written there after 'Mary Birdsall'?

A It was not. It was written at the time I delivered the book, at the time of the initial deposit. Mr.

(Testimony of Frank J. Nichols.)

Birdsall directed the entry of the account. He was the only one present when the account was opened.

Q No, I mean to the bookkeeper. What is the system of opening the account?

A Well, I would pass it in to one of the tellers. There was no direction. The deposit shows the disposition of the deposit.

Q Who in the bank has authority to accept new deposits, or had at that time?

A The officers, I think, were all. The tellers were not permitted to open new accounts. I never heard of any other account with these people. I gave directions for the opening of that account.

Q Do you recall whether or not there was an error in the title on the ledger sheet that is in evidence here, that has been shown here?

A Well, I have heard that the bookkeeper placed the word 'and' instead of 'or'. I don't know that I saw it, but I heard that he did. I always use 'or' in opening all joint accounts.

I have been in the banking business over 16 years and in this city 13 years. I was cashier for the California Savings for 10 years and of the Continental for 3 years - - or president of the Continental two years and a half.

Q Are you able to state whether it was customary in all cases of joint accounts to have both signatures on the same card?

A It is not.

(Testimony of Frank J. Nichols.)

Q I will ask you whether or not it is customary on deposit slips to always put your names on a joint card or a joint slip?

A It is not.

Q What is the custom as to depositing - - not in one bank alone, but is there a custom as to making deposits in joint accounts where the slip only contains one name of a depositor instead of both?

A It will be credited in the joint account.

Q Would the fact that there was or was not any other open account on the books of the bank have anything to do with that?

A Well, if I understand you, if there was a joint account and another account, the other would likely be under the name of one as 'special', or 'No. 2', or some word to designate that it was an individual account otherwise there would be confusion in the books.

Q I believe I asked you whether during the time this joint account was open, either of the parties had any other account with the bank?

A Not to my knowledge.

Q Did you make any investigation of that when that question came up?

A I did not.

CROSS-EXAMINATION

BY MR. PALMER:

Q Mr. Nichols, you say it is the custom of the bank not to have joint signature cards?

A I didn't say that; although we don't have joint

(Testimony of Frank J. Nichols.)

signature cards, we have what we call a power of attorney on the back of our cards, which, if I am permitted to explain, I will tell you why it is there and what use we make of it.

Q Did you prepare this for signature -- referring to exhibit 13 for identification?

A It seems to me that I did. There is nothing on there to indicate that I did. We use the blue and green stamp on there very frequently. There was not one on my desk but I knew there was one in the bank. This was used for making joint accounts or survivorship.

MR. PALMER: We offer in evidence, your Honor, Plaintiff's Exhibit 13 for identification as showing the stamp that was used by the bank where there was a joint account.

MR. DUNNIGAN: I have no objection to the stamp alone going in evidence, but I do object to the balance of the card being in evidence.

THE COURT: Will you read it?

MR. PALMER: 'Joint owners, subject to the order of either, the balance at the death of either to belong to the survivor,' and then two lines for signatures.

THE WITNESS: We had that stamp in September and October of 1920. They were frequently used but not always. I did not have one on my desk.

Q BY MR. PALMER: I show you this paper, Mr Nichols. Do you know what that is (handing witness defendant's Exhibit B)?

(Testimony of Frank J. Nichols.)

A That is the original ledger sheet of the bank.

Q And it shows an alteration, does it not here (indicating)?

A It looks like the word 'or' has been substituted and the word 'and' erased. On the corner of the sheet is written in pencil 'Fred Birdsall' and 'Mary Neville Birdsall', but I can explain that to you. Because these sheets originally - - the names are made out in pencil and then they are passed to the stenographer who writes in the name, and that is the names written in pencil by one of the clerks in the department. That is the pencil notation, and then they are passed to the stenographer and she writes in the name on the typewriter and erases the pencil.

Q BY MR. PALMER: Now you testified awhile ago that you didn't know either one of these parties having any other account in your bank. As a matter of fact Fred Birdsall did have another account, didn't he?

A I don't know of any.

Q Don't you know that he had an account of loans?

A He had no account of loans that I know of. I made him a loan but there was no account made of it that I know of. I made him a loan but there was no account made of it that I know of. I think he got a cashier's check, that is - - or one of them. I think I made him two loans. I think I made him a loan on September 29th, if this is the item I think it is,

(Testimony of Frank J. Nichols.)

\$400.73. I think he got the money to pay freight on an automobile. I don't know now that that is the particular loan, you understand. I have two loans and I can't tell them apart now. One of them was secured by Mr. Strong, Frank R. Strong. He was a stockholder and a director in the bank at that time. I think he is yet. He has offices at 1015 Marsh Strong Building. The loan secured by Mr. Strong, I think it was \$500, the first one I made. I don't remember about the second. But I am not positive as to that. I think it was \$400 or \$500. I do not know that the check of October 1st 1920 by Birdsall for \$900.76 was for a repayment of these loans.

Q Now when Mr. Birdsall came to you that first time to open an account he had a \$500 check, didn't he?

A He evidently had \$500. That is not indicated on the deposited slip, whether it was a check or which way. I don't know that I ever saw Plaintiff's Exhibit 10 before. I don't remember whether he brought me that check on September 14th to open that account.

I do remember very well that he brought a \$2500 check payable to Mary Birdsall and endorsed by Mary Birdsall. Perhaps I did not require him to endorse it. I deposited it in this account. That was the only account he had."

The witness was here shown Plaintiff's Exhibit 11.

Q I will now ask you if you saw that check before.

(Testimony of Frank J. Nichols.)

A I don't place it. I don't think I made out the deposit ticket on that, but I don't know.

Q Then if any check or deposit slip or anything of that kind came into your account after the joint account was opened, as you say, whether it was in the name of Fred Birdsall or whether it was in the name of Mary Neville Birdsall, you put all of it in the joint account?

A I would put it in the joint account without any statement or orders or anything of the kind. I would put it in the joint account unless there was a statement to the contrary, of course. The total amount placed in the joint account, according to the books, was \$4400. I do not know when the word 'or' was put in the book.

Q When the account was carried in the book under the name of Fred Birdsall and Mary Neville Birdsall that required the signature of both of them to a check to get the money out of it, didn't it?

A I wouldn't say so, and I don't know that it was every carried by the bank in that way. It should not have been. The direction was the deposit slip which I turned in. That is the initial deposit. That is the direction to the bookkeeper as to how the account is to be carried.

Q When an account in your bank is opened in the name of two people, one and the other, is it not a fact that you require the signatures of both to the checks?

(Testimony of Frank J. Nichols.)

A I never opened an account in that way and couldn't answer the question. I never do it. I always use 'or'.

Q You never had an account where two persons had to sign the check? Never heard of such a thing as that?

A Oh no, of course I have heard of such a thing, but then they are rare, very rare.

Q You never had any talk with Mary Neville, or Mary Neville Birdsall, in regard to this account until after the arrest of Fred Birdsall, did you?

A I can't say that I did. I don't think she gave me any direction in regard to it. She never gave me any writing in regard to it. She never told me to pay it out on the check of Fred Birdsall, and she never told me to open it in the name of Mary Neville Birdsall or Fred Birdsall. I never had any writing to that effect. I did not make a personal loan to Fred Birdsall. I did not loan him \$250. I knew that for a time Fred Birdsall was apparently selling real estate for Frank Strong. The other members of the firm were McGrath and Selover. I think Selover bought the \$2500 automobile. I do not know that he paid \$3000 for it.

REDIRECT EXAMINATION

BY MR DUNNIGAN:

Q Do you recall any conversation at the time the \$2500 was deposited as to the matter of the deposit? I am not asking you for your conclusion, but just

(Testimony of Frank J. Nichols.)

yes or no. Was there any conversation on the subject of the deposit?

A I cannot positively recall any. The bank book was presented to me at that time in connection with the deposit. No other book was presented. The entry was made in the presence of Mr. Birdsall in that book.

Q You spoke in your cross-examination of a stamp which was used in case of survivorship. Does a bank draw a distinction between deposits carrying a survivorship and deposits upon which either party may draw?

A Well, I can't say that we draw a distinction, but sometimes customers request that. They will ask that they be so deposited that it may be drawn by the other in the event of death, and while we don't enter into the matter of the law to change that, we use that stamp. The joint card was frequently used without the stamp.

Q BY MR. PALMER: Did you have any cards at all for a joint account?

A No, only what you see there. They all used the same card. We had no printed card for joint account other than what we wrote on them.

Q BY THE COURT: This initial deposit slip made September 4th, is that \$500 in your handwriting?

A Yes, that is my writing, and it says down here 'new'. That is mine, too. That means new account.

(Testimony of Frank J. Nichols.)

That is the direction to the bookkeeper to open a new account.

That initial deposit slip was not made in the name of Mary Neville Birdsall only. Both names have been written on it and the deposit book. The ledger sheet is written up from that ticket. The ticket goes back to the clerk in the Bookkeeper's department and the ticket states 'new', which means a new account, and therefore he would prepare a new ledger sheet for that account. The heading should be the same as the ticket.

Whereupon the defendant, Continental National Bank, rested its case.

That thereupon counsel for the plaintiff, in open court, waived any claim of the plaintiff to recover in this action any part of the deposit to said account amounting to \$400.00, and made on the 29th day of September, 1920, and waived the right to recover any part of one of the deposits amounting to \$500.00, made in said account on the 4th day of October, 1920.

That thereupon the cause was duly argued by counsel for plaintiff and defendant.

Whereupon the court instructed the jury as follows:

"THE COURT: Gentlemen of the jury, you are the sole judges of the facts in this case. I have a right to express my opinion concerning the facts and the credibility of the witnesses, but if I do express my opinion concerning the facts or credibility of the

witnesses you are not bound by my opinion but should exercise your own independent judgment. I state to you what the law is, and you are bound under your oaths to follow the law as I state it to you. You have no right to set up your own opinion as to what the law is as against what I say it is. If I state to you a proposition of law which is not the law, the Court of Appeals will set the proceeding aside, and therefore it is important that you follow the court's instructions as to the law.

The burden of proof is on the plaintiff. The plaintiff must prove her case by a preponderance of the evidence. Among the things that the plaintiff must prove is the fact that the money for which she sues was her separate property and that the deposits made in the bank were made for her sole use and benefit. A preponderance of the evidence is sustained when you are satisfied from the evidence that the weight thereof is with the plaintiff. You do not ascertain a preponderance of the evidence by the number of witnesses but by evidence which satisfies your minds that the preponderance is with the plaintiff.

When any deposit with a bank shall be made by or in the name of any married woman or minor the same shall be held for the exclusive right and benefit of such depositor and free from the control or lien of all other persons except creditors, and shall be paid, together with the dividends, if any, and interest, if any thereon, to the person in whose name the deposits shall have been made, and the receipt or acquittance

of such minor shall be a valid and sufficient release and discharge for such deposit or any part thereof to the bank. It is (unnecessary for the bank to know that a party is a minor. Every bank must take notice of the fact when a minor is dealing with them.

When a deposit with a bank shall be made by any person in the names of such depositor and other person or persons, and in the form to be paid to either, or the survivor or survivors of them, such deposit thereupon, and any additions thereto made by either of such persons, upon the making thereof, shall become the property of such persons as joint tenants, and the same together with all interest thereon, shall be held for the exclusive use of the persons so named and may be paid to either during the lifetime of any or all or to the survivors or the survivor after the death of one or more of them, and such payments and the receipt of acquittance to one to whom such payment is made shall be a valid release and discharge to said bank for all payments made on account of such deposits.

National banks are subject to the laws of the state and are governed in their daily course of business by the laws of the state when not in conflict with the laws of the United States. All their contracts are governed and construed by state law. Their acquisition and transfer of property, their right to collect debts and their liability to be sued for debts are all based on state laws. The state law is only void when it conflicts with the laws of the United States

and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies to discharge the duties for the performance of which they were created.

Any entry by a bank in a pass book of a depositor in the usual form crediting him with a certain sum deposited does not constitute a written contract between the parties but is merely evidence in the nature of a receipt for the deposit and may be explained or contradicted by oral testimony.

The obligation of the bank is not merely to use reasonable care to pay on the depositor's order and in accordance therewith; its undertaking and obligation are absolute that it will pay only in that manner. The absence of negligence on the part of the bank is wholly immaterial.

The usage of banks in respect to the powers and duties of its officers so far as such usage is known to the business public enters into and qualifies the contracts made by such banks through their officers. Custom and usage, if reasonable, have a binding force between the bank and the customer.

No estoppel arises where the representation or the conduct of the parties sought to be estopped is due to ignorance founded upon any innocent mistake. Knowledge of the truth as to the material facts represented or concealed is generally indispensable to the application of the doctrine of equitable estoppel unless the ignorance of the party against whom the estoppel is claimed was the result of gross negligence or other-

wise involves gross culpability, as where he is consciously ignorant of the facts at the very time of professing full knowledge of them.

If a man deposits money in a bank in his wife's name he has no right to check it out in his own name if it is her separate property, and if the bank pays her money out on his check it is liable to the wife for the money so paid out.

In an action by a depositor to recover money deposited in the bank and paid out by the bank on unauthorized checks, absence of negligence on the part of the bank is wholly immaterial. The obligation of the bank is not merely to use reasonable care to pay on the depositor's order and in accordance therewith, but its undertaking and obligation are absolute that it will pay only on the depositor's order.

This is an action prosecuted by the plaintiff to recover from the defendant Continental National Bank and Birdsall certain moneys alleged in the complaint to have been deposited with said defendant bank in the name of or for the account of plaintiff, Mary Neville Birdsall, or Mary Neville.

The complaint alleges that the aggregate amount of these deposits was \$4,400. The defendant Continental National Bank in its answer denies that any of such money was deposited to the account of the plaintiff Mary Neville Birdsall but said defendant bank alleges that said sums, aggregating \$4,400.00 were deposited by the defendant Fred Birdsall with said defendant bank to the joint account of said de-

fendant Fred Birdsall and said plaintiff Mary Neville Birdsall, and that it was by said deposit agreed that the said defendant bank should pay out of said account on checks signed by either the plaintiff or the said Fred Birdsall, and that it, the said defendant bank, has paid out upon checks so drawn all of said money except the sum of \$9.85, which sum defendant admits to hold in said account. If you find from the evidence that no part of said sums of money were deposited to the separate account of the plaintiff, but that all of said money was, with her consent, deposited to the joint account of the plaintiff and Fred Birdsall, or to their joint and several accounts, and that checks have properly been drawn and paid against said account, aggregating \$4,390.15, then your verdict should be for the plaintiff in the sum of \$9.85.

If you find from the evidence that any of said sums of money were deposited to a separate account of the plaintiff Mary Neville Birdsall, then your verdict should be for said plaintiff for the amount of money so deposited less the aggregate amount of checks which you may find from the evidence to have been drawn on said account by said Mary Neville Birdsall and paid by said defendant bank.

Section 33 of the Code of Civil Procedure of the State of California provides:

‘A minor cannot give a delegation of power, nor under the age of 18 make a contract relating to any personal property not in his immediate possession or control.’

Section 3103 provides:

‘The endorsement or assignment of the instrument by an infant passes the property therein notwithstanding that from want of capacity the infant may incur no liability thereon.’

The instrument there refers to a negotiable check. ‘Infant’ and ‘minor’ mean the same thing.

A JUROR: Will you read that again, your Honor?

THE COURT: ‘The endorsement or assignment of a negotiable check by an infant or minor passes the property therein notwithstanding that from want of capacity the infant or minor may incur no liability thereon.’ That is to say, by incurring a liability means that they are not liable on an endorsement.

I have stated to you that a minor cannot bind an agent, and any instruction given to the defendant bank by Birdsall would not bind the plaintiff except to the extent that the endorsement by her of a check made payable to her and delivered by her to Birdsall would create an apparent ownership in the said Birdsall of said check. To that extent she had a right and was bound by such apparent ownership when presented to the bank and the bank had a right to draw any reasonable inference from that fact, that the said Birdsall had a right to direct how the deposit should be made but had no right to give such directions to the bank except by virtue of that fact.

In receiving said deposit the defendant bank had a right to assume that any check presented to said bank for deposit was owned by the party presenting the

check, provided the check was duly endorsed without limitation of the endorsement by the payee thereof and the bank had no information which would put them upon notice to the contrary.

A deposit in the name of two persons with the word 'and' between the two names makes the account a joint account, and the money cannot be drawn from the bank except upon the signature of both persons. If a deposit is made in the bank in the name of two persons with the word 'or' between the names it makes the account joint and several. In such an instance either one of the parties may draw a check or both may draw a check together.

In determining whether or not any particular item was deposited to the credit of the plaintiff or to the joint or several credit of the plaintiff and Fred Birdsall you shall determine from the evidence what was the agreement of the party making the deposit in the bank.

In using the word 'the party may deposit' you shall not understand that I am referring to Fred Birdsall as an individual acting in this case, but you are to determine whether the transaction showed that such deposit was made by Mary Neville or by Fred Birdsall for her use and benefit.

In determining any question in the case you shall take into consideration all the evidence introduced and the circumstances surrounding any particular facts or act of the parties.

The evidence introduced here shows a pass book of the bank made out showing that the deposits were made to the account of Fred Birdsall or Mary Neville Birdsall. The Plaintiff contends that she never saw that passbook with the name Fred Birdsall written in it. A question for you to determine is whether or not, upon the making of said first deposit, a different pass book was made out by the bank and that she saw such different pass book made out by the bank. If the only pass book that the bank made is the one introduced in evidence and that pass book was tendered at the time of making of any deposit you have a right to take that into consideration in determining the question as to whether or not said sums were deposited to the plaintiff's credit or to the joint or several account of Fred Birdsall and the plaintiff.

The plaintiff would not be bound by any transaction between Fred Birdsall and the bank that she did not know of at the time or had reasonable grounds to believe; for, as I have heretofore instructed you, she could not appoint an agent to transact business for her if you find she was a minor at the time.

A deposit slip made out by a party and presented to the bank at the time of the deposit is a direction to the bank to credit said deposit to the name of the party appearing on the deposit slip and the bank has no legal right to place said money to the credit of any other person or persons. The deposit slip, however, may be controlled by other evidence; that is to say,

the deposit slip is not conclusive as a direction to the bank as to whom the deposit shall be made. Oral directions may be given or other instructions may show that the party intended the deposit should be made in the name of some other party than that on the deposit slip.

If you find from the evidence that the plaintiff did not know that there was a joint and several account in the defendant bank then she would not be bound by a deposit of her money in the bank in such joint and several account. The presentation of a pass book to the bank at the time of making a deposit is evidence of what the depositor intended the bank to do and should be considered in connection with the deposit slip. Such book, however, would not bind the plaintiff in any way unless she knew of the existence of such pass book.

If Fred Birdsall presented a check to the bank which was payable to Mary Neville Birdsall and duly endorsed by her, and at the same time that said check was presented for deposit, a deposit slip to the effect that said money should be deposited to Mary Neville Birdsall, then the bank had no right to credit such deposit to the joint and several account of Fred Birdsall and Mary Neville Birdsall but should have credited it solely to Mary Neville Birdsall.

When you retire to consider of your verdict, elect one of your number foreman, and when you shall have agreed upon a verdict let the foreman sign it

and bring it into court. You cannot agree upon a verdict unless you all concur therein.

Are there any exceptions to the instructions?

MR. DUNNIGAN: Yes, your Honor.

THE COURT: Proceed, Mr. Dunnigan.

MR. DUNNIGAN: The defendant Continental National Bank excepts particularly to the last instruction given by the court to the effect that the presentation of a deposit slip and check in the name of Mary Birdsall, though endorsed by her deposit, raises a conclusive presumption. The ground of the objection is as follows: first that the statement of the court is not correct as a matter of law and, second, that it is contradictory of the other instructions.

Defendants also excepts to that part of the instructions following instruction No. 6 requested by the plaintiff to the effect that if a man deposits money in his wife's name he has no right to check it out, upon the specific ground that the instruction is confusing, especially in this case where it was deposited in the wife's name and also in the husband's name, the instruction being, we feel, ambiguous in that respect. The defendant also excepts to the refusal of the court to give the defendant's requested instruction No. 4.

The defendant objects to the instructions given by the court of its own motion to the effect that Mary Neville Birdsall would no be bound by a deposit in the bank in a joint or several account of her separate money without her instruction under the circumstances

of this case, first because the statement is contended by the defendant not to be the law, and, second, because it is contradictory, in this, that it contradicts the instruction which authorizes the bank to recognize properly endorsed checks in the hands of Birdsall as his property together with his right, so far as the bank is concerned, while acting in good faith, to accept and deal with the deposit according to his instructions and as his property.

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BE IT FURTHER REMEMBERED that thereupon, the cause having been submitted to the jury, and the jury having considered the same, duly returned into court a verdict in favor of the plaintiff and against the defendant, for the sum of Thirty-five Hundred (\$3,500.00) Dollars, together with interest at seven per cent (7%) per annum, from the 20th day of October, 1920, to the date of entry of judgment.

BE IT FURTHER REMEMBERED, that the foregoing is a full, true and correct statement of all of the evidence received, offered or received in the trial of said action, and of all of the exceptions taken and reserved, respecting the introduction or rejection of evidence or the proceedings in said case so far as the same relate to the specifications of error, or the specification of insufficiency of the evidence to sustain the verdict hereinafter referred to in this bill of exceptions.

ASSIGNMENT OF ERRORS

The defendant, Continental National Bank does now hereby assign the following errors committed by the court in the trial of said cause, upon which it proposes to rely in the *prosecution* of a writ of error in the above entitled action, to wit:

I.

The court erred in refusing to permit the defendant Continental National Bank to prove by oral testimony, that its books did not contain, and that there was no account upon its books other than the joint and several account referred to in the evidence, and especially that it had on its books, no account, or report of account, with the plaintiff Mary Neville Birdsall, or Mary Neville separately or individually, or with the defendant Fred Birdsall separately and individually, or any other account with either of the parties, other than the joint and several account referred to in the testimony.

II.

That the court erred in instructing the jury that the fact that the deposit slip, being made out in the name of the plaintiff alone, and the fact that the deposit consisted of a check originally drawn to the order of the plaintiff, though properly endorsed by her and in the possession and offered for deposit by the defendant, Fred W. Birdsall, were conclusive on the defendant bank as to its obligation to deposit the amount of such check to the credit of the plaintiff

alone, and not to deposit the same to the joint and several account of the plaintiff and the defendant Birdsall, notwithstanding the fact that there was evidence to the effect that the defendant Birdsall presented said check as the apparent owner and holder thereof, and directed that it be deposited to the credit of said joint and several account, and notwithstanding the fact that the defendant, Continental National Bank in good faith, and relying upon the apparent ownership of said check in said defendant Birdsall, did actually deposit said money to the joint and several account of the plaintiff and the defendant, Fred W. Birdsall, and notwithstanding the fact that there was evidence to the effect that the defendant bank actually paid out said money in good faith upon the checks of the defendant, Fred W. Birdsall, in accordance with the terms of said deposit.

III.

The defendant bank specifies that the court erred in instructing the jury to the effect that the defendant bank was not authorized to receive a deposit to the joint and several account of the defendant Birdsall and the plaintiff, even though said deposit was made by the defendant Birdsall of a check which was in fact the separate property of the plaintiff, even though properly endorsed by the plaintiff, and by her delivered to the defendant Birdsall for deposit, and even though the defendant bank in good faith believed said check the property of the defendant Birdsall, unless the plain-

tiff specifically consented to such deposit in such manner.

IV.

The defendant bank hereby specifies that the court erred in giving to the jury contradictory instructions in this: That the court instructed the jury that if plaintiff properly endorsed a check payable to her order and delivered it to the defendant Birdsall, that this act clothed the defendant Birdsall with an apparent ownership of such check, upon which the defendant bank was entitled to rely in accepting a deposit thereof from the defendant Birdsall, and that said instruction is contradictory to the instruction given by the court and mentioned in specification of error number II, above set forth, and that such instruction is contradictory to the instructions given by the court and mentioned in specification of error number III.

V.

The defendant bank hereby specifies that the court erred at the trial of said cause, in giving contradictory instructions to the jury, in this: That the court instructed the jury to the effect that if the check of the plaintiff was properly endorsed by her and delivered by her into the possession of the defendant Birdsall, that said defendant Birdsall thereby became the ostensible owner thereof, and that the defendant, if acting in good faith, might deal with him as such in respect to said check, and the court further instructed the jury to the effect that the name of the depositor written

on the deposit slip was not conclusive upon the bank as to the person to whom the deposit should be credited by the defendant bank, and that the intention of the person making the deposit might be ascertained or controlled by other circumstances, or by verbal instructions given at the time, and that such instructions were in conflict with instructions given by the court to the jury to the effect that if the deposit slip was in the name of the plaintiff, and the item was a check drawn to the order of the plaintiff and duly endorsed by her, and delivered to the defendant Birdsall for deposit, that then the defendant bank was required to enter such deposit to the credit of the plaintiff alone, irrespective of any instructions given to the defendant Birdsall by the plaintiff to deposit it to the joint and several account of the plaintiff and the defendant Birdsall, and irrespective of all and any other circumstances connected with or attendant on the making of such deposit, and irrespective of the fact that the bank, in acting upon such instruction, in good faith actually deposited said check to the joint and several credit of the plaintiff and the defendant Birdsall, and actually paid out said money in good faith upon the checks of the defendant Birdsall.

The defendant here specifies the following particulars wherein the verdict of the jury was contrary to the undisputed facts and conclusive evidence submitted to them in this case, towit:

I.

The verdict of the jury, and the subsequent judgment entered thereon, is contrary to the undisputed and uncontradicted evidence in the case, insofar as it rendered a verdict in favor of the plaintiff and against the defendant for any part of the items of \$400.00 deposited in the account in question on the 29th day of September, and one of the items of \$500.00 deposited in the account in question, on the 4th day of October, for the reason that it was conclusively established by the evidence, without contradiction, that the plaintiff never had any title or interest in said sum or sums of money, or any part thereof, and for the further reason that the plaintiff in open court waived any right to recover any part of said sum or sums of money.

II.

The evidence is insufficient to sustain that part of the verdict of the jury, and the judgment subsequently entered thereon, as to the sum of \$500.00 deposited in said account on the 21st of September, 1920, for the reason that it was conclusively established by the direct evidence introduced in the case that plaintiff duly endorsed said check, delivered the same to the defendant, F. W. Birdsall; that said check was by the said F. W. Birdsall, deposited with the defendant bank, and that the deposit slip upon which said deposit was made was to the joint and several account of the plaintiff and the said defendant Birdsall, and that the

same was entered upon the books of the bank to the joint and several credit of the plaintiff and the defendant Birdsall, and that the same was entered into a regular pass book of the bank to the joint and several credit of the plaintiff and defendant Birdsall, and the same was paid out upon joint and several checks of the plaintiff and defendant Birdsall, and that in all of said transactions, the defendant bank acted in good faith and did not individually or personally profit in any manner thereby, or receive or retain for its own account any part of such deposit.

III.

The evidence is insufficient to sustain that part of the verdict of the jury, and the judgment subsequently entered thereon, as to the sum of \$2500.00 deposited in said account on the 2nd of October, 1920, for the reason that it was conclusively established by the direct evidence introduced in the case that plaintiff duly endorsed said check, and delivered the same to the defendant, F. W. Birdsall; that said check was by the said F. W. Birdsall, deposited with the defendant bank, and that the deposit slip upon which said deposit was made was to the joint and several account of the plaintiff, and the said defendant Birdsall, and that the same was entered upon the books of the bank to the joint and several credit of the plaintiff and the defendant Birdsall, and the same was paid out upon joint and several checks of the plaintiff and the defendant Birdsall, and that in all of said transactions,

the defendant bank acted in good faith, and did not individually or personally profit in any manner thereby, or receive or retain for its own account any part of such deposit.

IV.

The evidence is insufficient to sustain that part of the verdict of the jury, and the judgment subsequently entered thereon, as to the sum of \$500.00, deposited in said account on the 4th day of October, 1920, for the reason that it was conclusively established by the direct evidence introduced in the case that plaintiff duly endorsed said check, and delivered the same to the defendant, F. W. Birdsall; that said check was by the said F. W. Birdsall, deposited with the defendant bank, and that the deposit slip upon which said deposit was made was to the joint and several account of the plaintiff and the said defendant Birdsall, and that the same was entered upon the books of the bank to the joint and several credit of the plaintiff and the defendant Birdsall, and the same was paid out upon joint and several checks of the plaintiff and the defendant Birdsall, and that in all of said transactions, the defendant bank acted in good faith, and did not individually or personally profit in any manner thereby, or receive or retain for its own account any part of such deposit.

V.

The defendant bank further specifies that the said verdict of the jury and the judgment subsequently

entered thereon, are contrary to the undisputed facts established by the evidence in the case, as to the entire amount of said verdict in this: That it was established conclusively by the evidence in said case, without any evidence to contradict the same, that each and all of the items of the account sued for, were either the separate and distinct property of the defendant Fred W. Birdsall, or that the said Fred W. Birdsall was clothed with the apparent ownership thereof by the plaintiff; that each and all of said items were deposited to the joint or several account of the plaintiff and the defendant Fred W. Birdsall with the defendant bank, and that each and all of said items were paid out in good faith by the said defendant bank upon checks of the plaintiff and the said defendant Birdsall, and that the said bank, in receiving said deposits in the manner aforesaid, and in paying out said items of said money, except the sum of \$9.85, acted in good faith and in the belief that the said sums of money were the property of the defendant Fred W. Birdsall, and that as to the balance remaining in said account, of \$9.85, said bank had in good faith offered to pay the same to the plaintiff and the plaintiff had and continues to refuse to accept the same.

The defendant bank does now propose the above and foregoing as its proposed Bill of Exceptions to be used upon the prosecution of a Writ of Error in the above entitled action, for the correction of the

errors hereinbefore specified, and of the verdict in the above entitled action, and the judgment entered thereon, all as provided by law. and asks that the same be settled and allowed by the Court.

Dated: May 29th, 1922.

HAAS AND DUNNIGAN,
Attorneys for the Defendant,
Continental National Bank.

The foregoing Bill of Exceptions having been prepared and proposed and amended and engrossed, within the time allowed by law, and the extensions of time granted by the court and counsel, is hereby settled and allowed, and is correct.

Dated this 26 day of June, 1922.

Trippet

Judge.

IT IS HEREBY STIPULATED that the facts stated in the above certificate are correct, and

IT IS STIPULATED that the Bill may be signed.

George B. Ross, and
Newby & Palmer

Attorneys for Plaintiff.
Haas & Dunnigan

Attorneys for Defendant,
Continental National Bank.

[Endorsed]: ORIGINAL NO. 896 CIVIL IN
THE DISTRICT COURT OF THE UNITED

STATES, for the Southern Division of the Southern District of California. MARY NEVILLE, Complainant vs. CONTINENTAL NATIONAL BANK, a corp. et al, Defendant PROPOSED BILL OF EXCEPTIONS FILED JUN 27 1922 Chas. N. Williams, Clerk Louis J. Somers Deputy HAAS & DUNNIGAN Suite 302 B. F. Coulter Building 213 S. Broadway Los Angeles, Cal. Solicitors for defendant bank.

IN THE DISTRICT COURT OF THE UNITED
STATES, FOR THE SOUTHERN DISTRICT
OF CALIFORNIA, SOUTHERN
DIVISION.

MARY NEVILLE,	)	NO. 896 Civil
)	
Plaintiff.)	
	)	ASSIGNMENT
vs.)	<hr/>
	)	OF ERRORS.
CONTINENTAL NATIONAL)	<hr/>
BANK, a corporation, and FRED)	
BIRDSALL,)	
)	
Defendants.)	

Continental National Bank, defendant in this action, in connection with, and as a part of its petition for writ of error in the above entitled cause, makes the following assignment of errors, which it avers were committed by the Court in the proceedings and judgment against this plaintiff appearing on record herein, that is to say:

I.

The court erred in refusing to permit the defendant Continental National Bank to prove by oral testimony, that its books did not contain, and that there was no account upon its books other than the joint and several account referred to in the evidence, and especially that it had on its books, no account, or report of account, with the plaintiff Mary Neville Birdsall, or Mary Neville separately or individually, or with the defendant, Fred Birdsall separately and individually, or any other account with either of the parties, other than the joint and several account referred to in the testimony.

II.

That the court erred in instructing the jury that the fact that the deposit slip, being made out in the name of the plaintiff alone, and the fact that the deposit consisted of a check originally drawn to the order of the plaintiff, though properly endorsed by her and in the possession and offered for deposit by the defendant, Fred W. Birdsall, were conclusive on the defendant bank as to its obligation to deposit the amount of such check to the credit of the plaintiff alone, and not to deposit the same to the joint and several account of the plaintiff and the defendant Birdsall, notwithstanding the fact that there was evidence to the effect that the defendant Birdsall presented said check as the apparent owner and holder thereof, and directed that it be deposited to the credit of said joint and several account, and notwithstand-

ing the fact that the defendant, Continental National Bank in good faith, and relying upon the apparent ownership of said check in said defendant Birdsall, did actually deposit said money to the joint and several account of the plaintiff and the defendant Fred W. Birdsall, and notwithstanding the fact that there was evidence to the effect that the defendant bank actually paid out said money in good faith upon the checks of the defendant, Fred W. Birdsall, in accordance with the terms of said deposit.

III.

The defendant bank specifies that the court erred in instructing the jury to the effect that the defendant bank was not authorized to receive a deposit to the joint and several account of the defendant Birdsall and the plaintiff, even though said deposit was made by the defendant Birdsall of a check which was in fact the separate property of the plaintiff, even though properly endorsed by the plaintiff, and by her delivered to the defendant Birdsall for deposit, and even though the defendant bank in good faith believed said check the property of the defendant Birdsall, unless the plaintiff specifically consented to such deposit in such manner.

IV.

The defendant bank hereby specifies that the court erred in giving to the jury contradictory instructions in this: That the court instructed the jury that if plaintiff properly endorsed a check payable to her

order and delivered it to the defendant Birdsall, that this act clothed the defendant Birdsall with an apparent ownership of such check, upon which the defendant bank was entitled to rely in accepting the deposit thereof from the defendant Birdsall, and that said instruction is contradictory to the instruction given by the court and mentioned in specification of error number II, above set forth, and that such instruction is contradictory to the instructions given by the court and mentioned in specification of error number III.

V.

The defendant bank hereby specifies that the court erred at the trial of said cause, in giving contradictory instructions to the jury, in this: That the court instructed the jury to the effect that if the check of the plaintiff was properly endorsed by her and delivered by her into the possession of the defendant Birdsall, that said defendant Birdsall thereby became the ostensible owner thereof, and that the defendant, if acting in good faith, might deal with him as such in respect to said check, and the court further instructed the jury to the effect that the name of the depositor written on the deposit slip was not conclusive upon the bank as to the person to whom the deposit should be credited by the defendant bank, and that the intention of the person making the deposit might be ascertained or controlled by other circumstances, or by verbal instructions given at the time,

and that such instructions were in conflict with instructions given by the court to the jury to the effect that if the deposit slip was in the name of the plaintiff, and the item was a check drawn to the order of the plaintiff and duly endorsed by her, and delivered to the defendant Birdsall for deposit, that then the defendant bank was required to enter such deposit to the credit of the plaintiff alone, irrespective of any instructions given to the defendant Birdsall by the plaintiff to deposit it to the joint and several account of the plaintiff and the defendant Birdsall, and irrespective of all and any other circumstances connected with or attendant on the making of such deposit, and irrespective of the fact that the bank, in acting upon such instruction, in good faith actually deposited said check to the joint and several credit of the plaintiff and the defendant Birdsall, and actually paid out said money in good faith upon the checks of the defendant Birdsall.

WHEREFORE this defendant prays that said judgment be reversed.

Haas & Dunnigan
HAAS AND DUNNIGAN,
Attorneys for Defendant,
Continental National Bank.

[Endorsed]: ORIGINAL No. 896 Civil IN THE DISTRICT COURT OF THE UNITED STATES, for the Southern Division of the Southern District of California. MARY NEVILLE Complainant

vs. CONTINENTAL NATIONAL BANK, a corporation, et al, Defendants ASSIGNMENT OF ERRORS FILED JUL 7 1922 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy HAAS & DUNNIGAN Suite 302 B. F. Coulter Building 213 S. Broadway Los Angeles, Cal. Solicitors for deft.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

MARY NEVILLE,	)	No. 896 CIVIL
)	
Plaintiff.)	
)	
vs.	)	PETITION FOR
	)	WRIT OF
CONTINENTAL NATIONAL	)	ERROR.
BANK, a corp., and FRED W.)	
BIRDSALL,)	
)	
Defendants.)	

To the Honorable the Judges of the United States District Court, in and for the South District of California, Southern Division:

Now comes the above named defendant, Continental National Bank, and files its petition for writ of error in the above entitled cause, and respectfully shows:

I.

That on the 16 day of February, 1922, this court entered a judgment on a verdict of the jury for

Thirty-three Hundred Eighty-six (\$3,386.40) Dollars, besides interest and costs, in favor of the plaintiff and against the defendant above named.

II.

That thereafter, this defendant duly made and presented to this court its motion for a new trial in the above entitled action, and that said motion was denied by this court on or about the 10th day of May, 1922.

III.

That in said judgment and in the trial of said action, and in the denial of said motion for a new trial, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the Assignment of Errors which this defendant has filed with this petition.

WHEREFORE, this defendant prays that a Writ of Error may be issued in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to said Circuit Court of Appeals for said Circuit, and that all further proceedings be suspended, stayed and superseded until the determination of said writ of error by said Circuit Court of Appeals for said Circuit.

HAAS AND DUNNIGAN,

Haas & Dunnigan

Attorneys for the Defendant,

Continental National Bank.

[Endorsed]: ORIGINAL NO. 896 Civil IN THE DISTRICT COURT OF THE UNITED STATES, for the Southern Division of the Southern District of California. MARY NEVILLE, Complainant vs. CONTINENTAL NATIONAL BANK, a corporation, et al. Defendant PETITION FOR WRIT OF ERROR FILED JUL 7 1922 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy HAAS & DUNNIGAN Suite 302 B. F. Coulter Building 213 S. Broadway LOS ANGELES, CAL. Solicitors for Deft.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

MARY NEVILLE,	) No 896 Civil.
)
Plaintiff.)
	) ORDER
vs.	) ALLOWING
	) WRIT OF
CONTINENTAL NATIONAL	) ERROR.
BANK, a corp., et al,)
)
Defendants.)

On this 7th day of July, 1922, came the defendant, Continental National Bank, by and through its attorneys, Haas and Dunnigan, and filed herein and presented its petition praying for the allowance of writ of error in the above entitled action to the

United States Court of Appeals for the Ninth Circuit, and it appearing to the court that said petition should be granted, and a transcript of the record and proceedings in the above entitled case, upon the judgment herein rendered, duly authenticated, together with the original assignment of errors, writ of error and citation, should be sent to the United States Circuit Court of Appeals for the Ninth Circuit as prayed, in order that such proceedings may be had as may be just to correct any manifest errors;

NOW THEREFORE, IT IS ORDERED that a writ of error be and the same is hereby allowed herein, and that the said writ of error issue out of and under the seal of the above entitled court to the clerk thereof; that a true copy of the record, proceedings and papers upon which the judgment herein was rendered, together with the assignment of errors, writ of error, and citation, duly authenticated according to law, shall be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, in order that said court may inspect the same and take such action thereon as it deems proper according to law and justice.

Dated this 7th day of July, 1922.

Trippet

Judge.

[Endorsed]: ORIGINAL No. 896 Civil IN THE DISTRICT COURT OF THE UNITED STATES, for the Southern Division of the Southern District of California. MARY NEVILLE Complainant vs.

CONTINENTAL NATIONAL BANK a corporation,
 et al., Defendants ORDER ALLOWING WRIT OF
 ERROR FILED JUL 7 1922 CHAS. N. WIL-
 LIAMS, Clerk By R S Zimmerman Deputy HAAS
 & DUNNIGAN Suite 302 B. F. Coulter Building
 213 S. Broadway LOS ANGELES, CAL. Solicitors
 for deft.

IN THE DISTRICT COURT OF THE UNITED
 STATES, FOR THE SOUTHERN DISTRICT
 OF CALIFORNIA, SOUTHERN
 DIVISION.

MARY NEVILLE,	)	No. 896 Civil.
)	
Plaintiff,)	
)	
vs.	)	BOND ON
	)	APPEAL.
CONTINENTAL NATIONAL)	
BANK, a corporation, et al,)	
)	
Defendants.)	

KNOW ALL MEN BY THESE PRESENTS, that
 we, CONTINENTAL NATIONAL BANK, a cor-
 poration, of Los Angeles, California, as principal, and
 United States Fidelity and Guaranty Company of
 Maryland, a corporation,

as surety, are held and firmly bound unto Mary Ne-
 ville, in the sum of \$6,000.00 lawful money of the
 United States, to be paid to her, her heirs, executors,

administrators, successors and assigns, to which payment well and truly to be made, we bind ourselves and each of us jointly and severally, and each of our executors and assigns by these presents.

Sealed with our seals this 8th day of July, 1922.

WHEREAS, the above named Continental National Bank has prosecuted a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment of the District Court of the United States, Southern District of California, Southern Division, in the above entitled cause,

NOW THEREFORE, the condition of this obligation is such that if the above named Continental National Bank shall prosecute this appeal to effect and answer all costs if it fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

CONTINENTAL NATIONAL BANK,

(Seal)

By W. D. Howard

President

By

Principal

UNITED STATES FIDELITY AND GUARANTY

COMPANY OF MARYLAND,

By J. St. Paul White

its attorney in fact

(seal)

Surety

Examined and recommended for approval as provided in rule 29.

Wm. Fleet Palmer
Attorney

I hereby approve the foregoing bond.

Dated the 8th day of July 1922

Trippet
Judge

STATE OF CALIFORNIA)
)ss:
COUNTY OF Los Angeles)

On this 8th day of July in the year one thousand nine hundred and twenty-two, before me, Frances L Bennett, a Notary Public in and for said County and State, residing therein duly commissioned and sworn, personally appeared J St Paul White, known to me to be the duly authorized Attorney-in-fact of the UNITED STATES FIDELITY AND GUARANTY COMPANY, and the same person whose name is subscribed to the within instrument as the Attorney-in-fact of said Company, and the said J St Paul White duly acknowledged to me that he subscribed the name of the UNITED STATES FIDELITY AND GUARANTY COMPANY thereto as Surety and his own name as Attorney-in-fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

(Seal)

Frances L Bennett
Notary Public in and for County, State of
California

[Endorsed]: ORIGINAL No. 896 Civ. IN THE DISTRICT COURT OF THE UNITED STATES, for the Southern Division of the Southern District of California. MARY NEVILLE, Complainant vs. Continental National Bank a corporation, *et* Defendant BOND ON APPEAL FILED JUL 7 1922 CHAS. N. WILLIAMS, Clerk By Edmund L Smith Deputy HAAS & DUNNIGAN Suite 302 B. F. Coulter Building 213 S. Broadway Los Angeles, Cal. Solicitors for Deft. C. N. B.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

MARY NEVILLE,	) No. 896 Civil.
)
Plaintiff,)
	) PRAECIPE FOR
vs.	) RECORD ON
CONTINENTAL NATIONAL	) WRIT OF
BANK, a corp., and FRED W.	) ERROR.
BIRDSALL,)
)
Defendants.)

TO THE CLERK OF SAID COURT,

Sir: Please prepare record on writ of error and include therein the following papers:

Amended complaint; demurrer to amended complaint; order overruling demurrer to amended complaint; verdict of the jury; judgment; bill of excep-

tions; assignment of errors; petition for writ of error; citation for writ of error; order allowing writ of error; and praecipe for record on writ of error.

Dated this 7 day of July, 1922.

Haas & Dunnigan
HAAS & DUNNIGAN,
Attorneys for the Defendant,
Continental National Bank.

[Endorsed]: ORIGINAL No. 896 Civil IN THE DISTRICT COURT OF THE UNITED STATES, for the Southern Division of the Southern District of California. MARY NEVILLE Complainant vs. CONTINENTAL NATIONAL BANK, a corporation, et al, Defendants PRAECIPE FOR RECORD ON WRIT OF ERROR FILED JUL 7 1922 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy HAAS & DUNNIGAN Suite 302 B. F. Coulter Building 213 S. Broadway Los Angeles, Cal. Solicitors for deft.

IN THE DISTRICT COURT OF THE UNITED
STATES, FOR THE SOUTHERN DISTRICT
OF CALIFORNIA, SOUTHERN
DIVISION.

MARY NEVILLE,	) NO. 896 Civil.
)
Plaintiff.)
	) SUPPLEMENTAL
vs.	) PRAECIPE FOR
	) RECORD ON WRIT
CONTINENTAL NA-	) OF ERROR.
TIONAL BANK, a cor-)
poration, and FRED W.)
BIRDSALL,)
)
Defendants.)

TO THE CLERK OF SAID COURT:

Sir: Please include in the record on Writ of Error in the above entitled action, the following papers in addition to those requested by Praecipe herein, dated July 7th, 1922, towit:

Amended Answer to *Amend* Complaint
Writ of Error and the Bond on Appeal.

Omit Demurrer to Amended Complaint and order overruling same there being no such papers on file

Dated this 18th day of July, 1922.

Haas and Dunnigan,
HAAS AND DUNNIGAN,
Attorneys for the Defendant,
Continental National Bank.

[Endorsed]: ORIGINAL No. 896 Civil IN
THE DISTRICT COURT OF THE UNITED

STATES, for the Southern Division of the Southern District of California. MARY NEVILLE, complainant vs. CONTINENTAL NATIONAL BANK, a corporation, et al, Defendants SUPPLEMENTAL PRAECIPE FOR RECORD ON WRIT OF ERROR. FILED JUL 20 1922 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy HAAS & DUNNIGAN Suite 302 B. F. Coulter Building 213 S. Broadway Los Angeles, Cal. Solicitors for said deft.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

MARY NEVILLE)	
)	
)	
Plaintiff)	
vs.	)	CLERK'S
)	
CONTINENTAL NATIONAL	)	CERTIFICATE.
BANK and ALFRED W. BIRD-)	
SALL)	
)	
Defendants)	

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 111 pages, numbered from 1 to 111 inclusive, to be the Transcript of Record on Writ of Error in the above entitled cause, as printed by plaintiff in error and presented to me for comparison and certifica-

tion, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation, writ of error, amended complaint, amended answer of Continental National Bank, verdict, judgment, bill of exceptions, assignment of errors, petition for writ of error, order allowing writ of error, bond on appeal, praecipe and supplemental praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Writ of Error amount to and that said amount has been paid me by the plaintiff in error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this day of August, in the year of our Lord One Thousand Nine Hundred and Twenty-one, and of our Independence the One Hundred and Forty-seventh.

CHAS. N. WILLIAMS,
Clerk of the District Court of the
United States of America, in and
for the Southern District of California.

By

Deputy.

